SINGAPORE REPORT

C.E.C. v. COMPTROLLER OF INCOME TAX

[A.C.J. (Winslow J.) June 18, 1971]

[Singapore — District Court Appeal No. 15 of 1969]

Income Tax — Appeal — Additional assessment — Purchase and sale of several lots of land — Whether part of trade or business — Whether profits from sale taxable — Sham transactions — Income Tax Ordinance (RS(A) No. 16 of 1966), s. 33(1).

Income Tax — Assessment — Excessive — Onus of proof — Income Tax Ordinance (RS(A) No. 16 of 1966), s. 80(3).

Evidence — Withholding evidence — Presumption — Evidence Ordinance (Cap. 4), s. 115, illustration (g).

This was an appeal in respect of income tax in the sum of $1,282,878.85 allegedly due from the appellant as additional assessment for the years 1958, 1960 and 1961, raised against him in 1965.

The appellant taxpayer came to Singapore sometime in 1951 with $1.78 million. In December, 1951, he bought land at Oxley Rise consisting of 211,313 square feet for $470,000 and immediately thereafter applied for planning approval of the said land. Earlier, in October 1951, he entered into a contract to purchase the land *HKP* consisting of over 30 acres for $300,000. On the day of completion of the contract, the appellant changed his mind, and most of the land was then conveyed to his son CBH, who was not a resident of Singapore. In 1957, the appellant entered into a contract on behalf of CCM, another of his sons, to purchase the land *KLP* consisting of 1,122,770 square feet for $853,305.20. He did not have a power of attorney to act on behalf of CCM. However all the negotiations for the purchase of the land and the subsequent applications for planning approvals were dealt with by the appellant. The land itself was conveyed to CCM who was also not a resident of Singapore.

Between May and July, 1957, part of the land at Oxley Rise and the land *HKP* were sold to the "construction company," the latter at a profit of $1.4 million. The land *KLP* was sold in June 1959 to the construction company at a profit of $2,555,709.30. During the said period the appellant was the chairman of the board of directors of the construction company. There were five directors of the construction company, all of whom were immediate members of the family of the appellant. Two of them CBH and CCM, never attended any meetings of the board though they were shown in the minutes of the meetings as having been present. The construction company subsequently built houses on the three pieces of land and sold them to the public.

During that period and for many years, there had been much movement of monies of the appellant and other members of his family between Hong Kong and Singapore, and between the construction company and other companies in which the appellant was a director. There were a whole series of complicated transfers and re-transfers of monies and other complex transactions that had not been explained and probably could not have been explained except, perhaps, by the appellant, who elected not to give evidence.

At the hearing before the board of review it was alleged by the comptroller that the three pieces of land were owned by the appellant, sold by him as part of his trade or business in dealing with land, and accordingly the profits of the sale of them were profits which were liable to tax under the Ordinance. The comptroller contended that the transactions or dispositions between the appellant and his two sons as regards the said lands were artificial and/or fictitious. He accordingly disregarded them under section 33 of the Income Tax Ordinance.

On the facts, the board was satisfied that the appellant had not discharged the burden placed on him under section 80(3) of the Ordinance; and that the appellant was the person who was aware of all the facts and the nature of the numerous and varied transactions that he had undertaken during the relevant period. It was he who could explain them. He was a vital witness. But as he had elected not to give the evidence the board therefore inferred that if he had given evidence, his evidence "would have been" unfavourable to him. The board also held that the arrangements made by the appellant whereby land *HKP* was conveyed to CBH and land *KLP* to CCM were not *artificial* transactions within the meaning of section 33 of the Ordinance; however, the comptroller was right in holding that the sale of the said two pieces of land by the appellant were *fictitious* and that the purpose or effect of the dispositions was to avoid tax. Therefore, he had rightly disregarded them and had sought to tax the appellant in respect of the three pieces of land.

The appellant taxpayer appealed to the High Court. It was contended on his behalf that once he had shown that the properties as evidenced by the title deeds were in the names of the two sons, he had discharged the onus on him of proving that the tax was excessive and of showing that the tax should have been nil. It therefore remained for the comptroller to rebut it by showing that the two transactions were sham, either at common law or as falling within the provisions of section 33 of the Income Tax Ordinance.

Therefore the main issue on appeal was whether the transactions were sham.

Held, allowing the appeal in respect of the land *HKP* and *KLP:* (1) where the comptroller has particularized the sources he is not at liberty to treat the case as an investigation case, and thereby to require the appellant to establish exactly what his income was from all sources. The onus of proving sham is on the comptroller when he tries to rebut the appellant's contention that the tax was excessive;

(2) section 33 of the Income Tax Ordinance has no relevance to this case because if the comptroller disregards what he considers to be transactions or dispositions which reduce tax there would be nothing left on which tax can be assessed. The disregarding of transactions does not itself create a liability to tax. Further, in order to make the appellant liable, the comptroller must show that the monies have come into his hands which the comptroller is entitled to treat as monies derived by him, that is, as profits from the transactions;

(3) the taxpayer discharges the onus on him of showing that the tax levied is excessive by making out a *prima facie* case that such tax is excessive. If the comptroller succeeds in rebutting this *prima facie* case then he need not go further than rebutting the taxpayer's case. The taxpayer would then not have discharged the burden on him as a whole. However, the burden of proof throughout until the end of the comptroller's case rests on the taxpayer to show that the tax is excessive;

(4) if it was the comptroller's contention that the properties were not in fact owned by the two sons he should have led some evidence as to this so as to create a conflict of evidence or to rebut the applicant's case. The clear documentary evidence coupled with the evidence of the solicitors concerned — matters which the Board never mentioned once in the course of its lengthy judgment — made it clear that the properties were owned by the two sons. The appellant never owned the properties at all. There was no evidence at all that the appellant ever was or remained the owner of these properties, or that he ever received the gains or profits from the sale of these properties to the family concern. In the circumstances it could not be said that he was liable to tax on any income in relation to the two properties under reference;

(5) the Board was wrong in using the expression "would" instead of "might" in so far as the court might draw an unfavourable inference on a failure to give evidence and accordingly that was the highest at which the matter could be put to the appellant's disadvantage. The appellant's case could have been made stronger than it already was if he

had himself given evidence. There was no duty on him then to deny anything. The reference to evidence in another appeal behind the backs of both counsel and its utilisations by the board in an effort to discredit the version given on behalf of the appellant was completely unjust, unjustified and should never "have been done";

(6) therefore, all the grounds, some relating to issues of law and some involving considerations of mixed law and fact, were clearly within the province of the court to consider on appeal. If they were sound, it followed that the decision must be set aside and that, where necessary, the court can reach its own independent conclusion on the facts by reviewing the evidence afresh. Thus, the appellant had discharged the onus upon him to show that the comptroller's assessment was wrong.

Held, in respect of the Oxley Rise property: there was evidence before the board to enable it to reach the conclusion which it did having regard to the circumstances as a whole coupled with the withholding of evidence in this regard by the appellant himself who was the only person who could have enlightened the board as to his state of mind at the relevant time. The assessment in respect of that portion of Oxley Rise which the appellant sold to the family concern must be upheld.

Cases referred to:-

(1) *Hudson* v. *Wrightson* 26 T.C. 55.
(2) *Hudson's Bay Co. Ltd.* v. *Stevens* 5 T.C. 42.
(3) *Harvey* v. *Caulcott* 33 T.C. 159.
(4) *M.N.O.* v. *The Comptroller of Income Tax* [1961] M.L.J. 223.
(5) *A.B.C.* v. *The Comptroller of Income Tax, Singapore* [1959] M.L.J. 162.
(6) *Comptroller of Income Tax* v. *A.B. Estates Ltd.* [1967] 1 M.L.J. 89.
(7) *Newton* v. *Commissioner of Taxation* [1958] A.C. 450.
(8) *Deputy Federal Commissioner of Taxation* v. *Purcell* (1920-21), 29 C.L.R. 464.
(9) *Amis* v. *Colls* 39 T.C. 148, at 163.
(10) 15 C.T.B.R. *Case 83.*
(11) *Hines* v. *F.C.T.* (1952) 5 A.I.T.R. 305.
(12) *Williamson* v. *Rover Cycle & Co.* [1901] 2 I.R. 619.
(13) *Ramoo* v. *Gan Soo Swee & Anor.* [1971] 1 M.L.J. 235, P.C.
(14) *S.T.U.* v. *Comptroller of Income Tax* [1962] M.L.J. 220.
(15) *Desmond Lees Peate* v. *C.I.T.* [1967] 1 A.C. 308.
(16) *Owen Thomas Mangin* v. *I.R.C.* [1971] 2 W.L.R. 39.
(17) *Phillips* v. *I.R.C.* (N.Z) 8 A.N.Z.I.T.R. 23.

APPEAL FROM THE DECISION OF THE BOARD OF REVIEW.

G. S. Hill (*Woo Tchi Chu* with him) for the appellant.

Sat Pal Khattar (Senior Legal Officer) for the respondent.

Cur. Adv. Vult.

Before the Income Tax Board of Review, *G. S. Hill* appeared for the appellant, *Amarjit Singh Verick*, for the respondent. The following grounds of decision were given on May 16, 1969:

Sinnathuray, Chairman (with whom **Martin J. Chen & Lim Teck Seng, Members** concurred): This is an appeal in respect of income tax in the sum of $1,282,878.85 allegedly due from the appellant as additional assessments for the years 1958, 1960 and 1961, raised against him in 1965. The facts are complicated as they refer back to monetary and landed property transactions which had taken place since the War in different countries and between the appellant and a number of other persons. It was clear at the hearing that the facts of the appeal had given much trouble to the comptroller. From the numerous documentary evidence tendered at the hearing, it is evident that the officers in the Income Tax Department have put in a considerable amount of work. Equally, since the service of the notices of additional assessments, the advisers of the appellant, particularly, counsel for the appellant, has done much research into the affairs and activities of the appellant, and the legal issues that arise for decision on the facts. I am grateful to Mr. Hill, for the appellant, for having furnished me with a 22-page written summary of the appellant's case in reply to the submissions made on behalf of the comptroller. Just as this appeal has taxed the minds of the comptroller and his officials, and, the appellant and his advisers, if the delay in giving these grounds of decision is any indication, it has caused some anxiety to me.

The appellant is over 70 years of age and is the head of a large family. As in the course of these grounds of decision I shall have to refer to some of his children, I should mention, there are 29 of them. It would appear that in 1949 he moved his business interests from Amoy, China, to Hong Kong, and Singapore, where he now has substantial business interests. In Income Tax Appeal No. 3 of 1962, the appellant's tax liabilities in respect of his trading and business activities between the years 1950 — 1953 in Singapore had been the subject matter of appeal before the Income Tax Board of Review. After the appeal had been part-heard, the then counsel for the appellant withdrew the appeal and there the matter ended.

Besides his other trading and business activities, the appellant had been the chairman of the board of directors of a large private limited company in Singapore, the shareholders of which are immediate members of his family. The company was engaged in buying and developing land, *inter alia*, for sale to the public. This company plays a prominent part in this appeal and is hereinafter referred to as the "construction company".

By three notices of additional assessments each dated the 25th of June 1965, the Comptroller of Income Tax raised assessments for the year of assessment 1958 to tax in the sum of $497,331.15, for the year of assessment 1960 to tax in the sum of $773,723.10, and for the year of assessment 1961 to tax in the sum of $11,824.60. On the 21st of July 1965 the solicitors for the appellant gave notice of objection, under section 76(2) of the Income Tax Ordinance (RS(A) No. 16 of 1966), to the comptroller in respect of the said assessments. The grounds of objection were the same as the grounds of appeal before the Income Tax Board of Review and I shall presently set them out. On the 20th of December, 1965 the comptroller, under section 76(4) of the Ordinance, issued three notices of refusal to amend the abovementioned notices of additional assessments. On the 21st of December, 1965 the appellant, through his solicitors, filed the notice of appeal, under section 79 of the Ordinance, with the

clerk to the board. The petition of appeal was filed on the 14th of January, 1966. At the hearing Mr. G. S. Hill appeared for the appellant and Mr. Amarjit Singh Verick for the comptroller.

As stated in a letter from the comptroller dated 25th of June 1965 (pages 1 and 2 of P.1) and in paragraph 3 of the petition of appeal, the appellant was alleged to be liable for assessment on the profits arising from the following property transactions: —

(I)	*Assessment Year 1958:*		
(a)	*Land HKP*		
	Mukim XVI Lots 3-7 & 3-13		
	Sold in 1957	$1,400,000	
	Cost in 1951 & 1953	301,769	$1,098,231
(b)	*Oxley Rise Land*		
	T.S. XX Lots 158 to 163		
	Sold in 1957	$ 240,000	
	Estimated Cost	90,000	$ 150,000
	Additional Chargeable Income		$1,248,231
(II)	*Assessment Year 1960:*		
	Land KLP		
	T.S. XXIV Lots 102-16 & 102-17		
	Sold in 1959		$2,555,769
	Cost in 1958		$1,006,974
	Additional Chargeable Income		$1,548,795
(III)	*Assessment Year 1961:*		
	Extra Land KLP		
	Sold in 1960		$ 38,862
	Cost in 1960		$ 14,064
			$ 24,798

The grounds of appeal set out in paragraph 5 of the petition of appeal are as follows: —

(i) Item I(a) referred to above was not bought or sold by the appellant.

(ii) Item I(b) referred to above was sold in 1957 by the appellant but not as part of a trade or business of dealing in land. If, which is not admitted, the said sale was a sale in the course of such dealings no profit arose on the sale which was a sale at cost.

(iii) Items II and III referred to above were not bought or sold by the appellant.

(iv) For the foregoing reasons no liability to tax on the appellant arises in any of the transactions as alleged or at all.

(v) The said assessments are, therefore, erroneous in law and excessive in amount as to the chargeable income and tax payable by the total sums shown therein.

The facts of the appeal then revolve around three pieces of land which, it is alleged by the comptroller, were owned by the appellant, sold by him as part of his trade or business in dealing with land, and, accordingly the profits of the sale of them were profits which were liable to tax under the Ordinance. I will deal with the facts under the headings of the three pieces of land.

Land at Oxley Rise.

P.W. 3, a solicitor, gave evidence that in 1951 his firm, but not he, acted for the appellant in the purchase of the land at Oxley Rise then known as Lots 68-9 and 68-16 in T.S. XX. The contract of sale (P. 26) is dated 7th December, 1951 and the appellant is described therein as the purchaser. The area of the land is 211,313 square feet and the purchase price was $470,000. The sale of the land included a right of way over a parcel of land adjacent to the land, Lot 68-10. An extract (P. 27) from the account books of the firm of the solicitors show that the appellant paid by cheques the purchase price of the land. The deed of conveyance (Part of P.28) of the land is dated the 18th of March, 1952.

Soon after the appellant bought the land, he applied for permission (page 1 of D. 6) to develop the land. On the 20th of June, 1952, the then Singapore Improvement Trust approved the lay-out of the Lots (page 4 of D. 6). The land was sub-divided and re-numbered as Lots 158 to 165. By an indenture of conveyance (Part of P. 28) dated 12th of July, 1957 the appellant sold to the construction company Lots 158 to 163 for the sum of $240,000, leaving in his ownership Lots 164 and 165. The conveyance included a grant of right of way over and along Lot 165 (road reserve). Plans of the sub-division are to be found in annexure "B" to the report (P. 3) and in annexure "B" to the report (D. 4).

P.W. 1, a chartered surveyor, auctioneer and estate agent, gave evidence that in December, 1966 he was instructed to report on the apportionment of $470,000 between Lots 158 — 163 inclusive and the remainder of the land Lot 164 and Lot 165 (road reserve) as at 1952. He tendered his report (P. 3). His conclusions are at page 3 of the report. In his opinion the estimated cost in 1952 of Lots 158 - 163 and Lot 165 (road reserve) which he exclusively allocates to Lots 158 - 163 is $209,300. It approximates to $2.22½ cents per square foot.

The comptroller has no objection to the value of the land being worked out at $2.22½ cents per square foot. What he says is that it is wrong to assign the whole of Lot 165 as an advantage to Lots 158 — 163 and nothing of it to Lot 164. P.W. 1's reasons are that access to Lot 164 may be gained from Oxley Rise via Lot 68-10 and this access involves only a small portion of Lot 165 (road reserve). Secondly, he maintains that as Lot 164 is considerably higher than Lot 165 (road reserve), the "road reserve cannot be utilised in connection with the use and occupation of Lot 164". On this point there is the evidence of D.W. 3 a valuer in the Property Tax Department. On the instructions of the comptroller he had prepared a report (D. 4) on the apportionment that should be made of the price of the land. It is his view the Lots 158 — 163 inclusive should be valued at $184,000. Lot 165 has area of 33,975 square feet. D.W. 3 allocates two-thirds of it to Lots 158 — 163 inclusive and one-third of it to Lot 164.

From their respective reports it will be seen that both P.W. 1 and D.W. 3 are agreed that the price paid for the land by the appellant was for the bare land with vacant possession of a house which had been the family residence of the appellant and has since been demolished. They both also agree that Lot 164 which consists of 117,230 square feet is a very valuable piece of land and is eminently suitable for development. From a contour map of the land (P. 35) it will be

seen that the house itself had been on a plateau and on the highest area. I accept the evidence of D.W. 3 that in any sub-division of land provision must be made for road reserve. I also accept his evidence that having regard to the size and locality of Lot 164 it is suitable for sub-division and re-development. Taking into consideration as D.W. 4 has done (see: annexures to D. 4) the access to Lot 164 and the fact that the appellant had exclusive ownership of Lot 165 until 1960 when he conveyed both Lots 164 and 165 (road reserve) to trustees, I find that Lot 165 (road reserve) cannot be attributed as an advantage wholly to Lots 158 — 163. It has to be apportioned between Lot 164 on the one hand and Lots 158 — 163 on the other. D.W. 4 apportions one-third of Lot 165 (road reserve) to Lot 164 and two-thirds of it to Lots 158 — 163 inclusive. Of the two-thirds he apportions one-third of it to Lots 158 — 160 and the other one-third to Lots 161 — 163 inclusive. I cannot say he has come to a wrong judgment. I, therefore, accept his apportionment of $184,000 as the value of the land in respect of Lots 158 — 163 as at 1952.

There is only one other matter that I should refer to on the issue of valuation. In his report (P. 3), P.W. 1 points out that when the appellant conveyed Lots 158 — 163 inclusive, the conveyance was adjudicated for stamp duty at a value of $230,000. That was a matter for the Commissioner of Stamps. It is not for me to say, in this appeal, whether he was right or wrong. I do not know on what evidence he came to his decision. I, however, had the oportunity to hear the matter fully to come to the decision I have made.

Land at Bukit Timah otherwise known as HKP.

P.W. 3 gave evidence that in October, 1951 his firm received instructions from the appellant to act on his behalf to purchase land in the district of East Bukit Timah, namely, Lot 3-7 and Lot 3-10pt. of Mukim XVI. The contract of sale (P. 21) is dated 28th October, 1951 and in it the appellant is described as the purchaser. The area of the land is over 30 acres and the purchase price is $300,000. An extract (P. 22) of the account books of the firm of solicitors shows that the appellant paid the purchase price by cheques. By a deed of conveyance (P.23) dated the 23rd of November, 1951, Lot 3-7 of Mukim XVI (the major part of the land described in the contract of sale (P. 21)) was conveyed not to the appellant but to one of his sons, CBH, whose address in the deed is in Penang. P.W. 3 said that prior to the completion of the sale he received an authority (P. 24) from the appellant in favour of the vendors authorising the vendors to convey, be it noted, both the Lots described in the contract of sale (P. 21) purchased by him to his son, CBH. It would appear that it was in pursuance of the authority (P. 24) that the deed of conveyance (P. 23) was executed in favour of CBH as the purchaser of Lot 3-7 of Mukim XVI.

As regards Lot 3-10pt. which subsequently became Lot 3-13 the land was conveyed to the appellant. By an indenture of conveyance (P. 16) dated the 27th of May, 1957, the appellant sold the land to the construction company. The area of this land was 23,985 square feet and it was sold for $20,000.

P.W. 2, another solicitor, gave evidence that in 1956 his firm acted for CBH who was residing in Hong Kong. By a contract of sale (P. 18) dated 23rd May, 1957, and a deed of conveyance (P. 15) dated the same day, CBH sold the land — Lot 3-7 of Mukim XVI — to the construction company for $1,380,000. It is of some importance for the purpose of this appeal to point out that under the said deed, CBH acknowledges receipt from the purchaser, the construction company, of only the sum of $69,000. There was tendered in evidence copies of correspondence (P. 14A) from the file of the firm of solicitors of P.W. 2. I must refer to a letter to CBH written by a solicitor of the firm. The relevant portion is as follows: —

"Dear Sir,

Re: Land at East Bukit Timah Road, Singapore
Area 30 acres 3 roods 0.31 poles —

Lot 3-7 of Mukim XVI

We are instructed by [the appellant] to act in the matter of the transfer of the above land by you to [the construction company].

....

Your right as vendor after completion will be to recover the balance of purchase money after three years from the date of completion. We are instructed that you and the company have agreed not to fix any definite date for the payment of the balance of purchase money. If you are in any doubt at all with regard to the special conditions of the agreement now sent to you, we suggest that you seek legal advice in Hongkong for the purpose of clarification."

In the contract of sale (P. 18), it is provided that the balance of the purchase price of $1,311,000 will be paid by the construction company to CBH within three years from the date of completion, the 23rd of May, 1957, and that,

"If the purchaser fails to pay the said balance of purchase-price or any part thereof within three (3) years from the 23rd day of May, 1957 the purchaser shall pay interest with effect from the 1st day of June, 1960 at the rate of five (5) per cent per annum on the said balance of purchase price or on any part thereof still remaining unpaid".

A bill of costs (P. 17) was rendered by the solicitors, but P.W. 2 was unable to say who paid the fees, the appellant or CBH.

The land was subsequently developed as a housing estate (see: D. 7).

Land off Paterson Road otherwise known as KLP.

P.W. 2 gave evidence that in 1957 his firm received instructions in connection with the purchase of land, then known as Broadfields Estate. The purchaser, his client, was one of the sons of the appellant who I will hereinafter refer to as CCM who was resident in Hongkong. The land has an area of 1,122,770 square feet and is made up of Lot 102-16 and Lot 102-17 of T.S. XXIV. The contract of sale (P. 8), however, was signed by the appellant in Singapore in the presence of a clerk of the solicitors.

The purchase price was $853,305.20. The deed of conveyance (P. 6) is dated the 25th of July, 1956. It appears from the bundle of correspondence (P. 5A) extracted from the file of the firm of solicitors of P.W. 2 that CCM was, throughout the negotiations for the purchase and the purchase of the land, resident

in Hong Kong. For the purpose of this appeal, I should refer to some of the correspondence that took place in the course of the purchase of the land. At page 8 of P. 5A there is a letter from P.W. 2 to the Controller of Foreign Exchange, Singapore, in which he says that the appellant who originally made the offer to purchase the land had paid to the vendors as a deposit $85,000. He seeks the permission of the controller under the Exchange Control Ordinance for the appellant to pay the balance of the purchase price of $769,592.10 to the vendors from a remittance received by the appellant from his son in Hong Kong. The controller replied (page 9 of P. 5A) that if the appellant could furnish evidence that the amount of $853,305.20 was transferred to Singapore through approved banking channels from Hong Kong, he would be prepared to authorise the appellant to make the payments to the vendors. The appellant through P.W. 2 furnished to the controller two bank notices received by him from the Kwangtung Provincial Bank of the remittance to him from Hong Kong (page 11 or P. 5A). I would pause here to observe that there is no evidence as to who or whose money it was that was actually transferred to Singapore. The controller was not interested in that matter. His concern was merely to see that the money was sent to Singapore from Hong Kong through proper banking channels. The controller was satisfied (page 12 of P. 5A) and he did not object to the payment by the appellant to the vendors which the appellant in fact did (page 13 of P. 5A). From the balance of the money received by the appellant from Hong Kong, the appellant paid the costs of the solicitors (pages 16 and 17 of P. 5A). Another matter that comes to light from the correspondence in P. 5A is that it was the appellant who throughout gave instructions to P.W. 2 on behalf of CCM. At page 13 of P. 5A the solicitors are writing to CCM informing him "we shall continue to take [the appellant's] instructions on your behalf and do what is best to protect your interest". I will add that the appellant himself was a client of the solicitors (page 10 of P. 5A).

P.W. 2 again acted for CCM in 1959 when the latter sold the land for $2,555,769.30 to the construction company by a deed of conveyance (P. 11) dated the 3rd of June, 1959. It is again significant to note, as in the case of the sale of the land *HKP* by CBH to the construction company, that in the indenture, CCM, as vendor, only acknowledges receipt of a very small portion of the purchase price, namely, the sum of $127,788.46. It is, however, provided, as in the contract of sale (P. 18) of the land *HKP*, in the contract of sale (P. 13) that the construction company, the purchaser, will pay the balance of the purchase price within three years from the 18th of May, 1959 and that

"If the purchaser fails to pay the balance of the purchase price or any part thereof within three (3) years from the 18th day of May 1959 the purchaser shall pay interest with effect from the 17th day of May 1962 at the rate of five per cent (5%) per annum on the balance of the purchase price or on the part thereof still remaining unpaid".

Once again, the solicitors wrote to the Controller of Foreign Exchange, Singapore. This time they inquired of him whether he had any objection to the sale of the land to the construction company and for permission to transfer the sum of $127,788.46 to CCM in Hong Kong. The controller replied that he had none, provided that the proceeds were remitted to CCM through a certain account. The letter and reply are P. 10. It should also be mentioned that on this occasion P.W. 2 acted for both the vendor and the purchaser and a bill of costs was rendered in the name of CCM (P. 12). P.W. 2 could not say who paid the bill. It was, however, paid in Singapore either by the appellant or the construction company. As regards the sum of $127,788.46, part of the purchase price paid to CCM, P.W. 2 said that the money did not pass through his firm.

The land was subsequently developed as a housing estate (see: D. 8).

I will now deal with the evidence of P.W. 4, a public accountant. He was instructed by the solicitors for the appellant to investigate and report on the circumstances concerning the purchase and sale of the lands *HKP* and *KLP*. He tendered his original report (P. 31) It is undated but it was prepared for the purpose of this appeal in December, 1966. For the preparation of his report he had seen and read the depositions of CBH and CCM which were taken in Hong Kong pursuant to an order of the board. I will deal with the evidence later. Also, for the preparation of the report he said that he had access to the account books and registers of the construction company. He did not, however, examine any records in Hong Kong and was, therefore, unable personally to give evidence of the origin of any monies stated to have been remitted from Hong Kong. From his examination of all the records and documents in Singapore which he thought were relevant, he concluded that he was unable to find any evidence to suggest that any part of the proceeds of sale of either land *HKP* or land *KLP* was paid or applied for the benefit of the appellant or in any way found its way back into the appellant's control. He then set out in his report in detail his reasons for his conclusions.

P.W. 4 was cross-examined at length on his report. I will deal with them in some detail.

First, in paragraph 5 of his report he maintained that the fact that CBH had remitted $1.78 million from Hong Kong to Singapore as alleged by CBH in paragraph 4 of his statutory declaration (page 3 of P. 30) was evidenced by a letter dated 3rd of January, 1967, from the Bank of China, schedule B of his report. This letter is addressed to a firm, hereinafter referred to as a "remittance shop", forwarding seven photostat copies of remittances, from Hong Kong to Singapore, of $4,000 each made between the 28th of May, 1949 to the 27th of June, 1949, and paid into the account of the remittance shop. He agreed with counsel for the comptroller that there was nothing in schedule B to indicate that the remittances were made by CBH. If not for the fact that he had sight of the deposition of CBH he could not say who had remitted the monies from Hong Kong to Singapore. He also agreed with counsel for the comptroller that his report does not seek in any way to confirm the evidence of CBH, that CBH had in fact remitted $1.78 million to Singapore.

Secondly, he was cross-examined on paragraph 6 of his report, that he had not examined the files and

accounts of the solicitors acting for CBH in the purchase of land *HKP*, nor did he concern himself with the incidental expenses that had been involved in the purchase of the said land. He said that he did not concern himself with these matters as the files were not available, but he would have if they had been.

Thirdly, on his statement that he had access to the books of account and registers of the construction company and to other relevant bank records, documents and materials, he said that he was unable to find in the books of the construction company any evidence of the purchase of the land *HKP*. This was because the accounts relating to the purchase were not available. It appeared from his evidence that he only made verbal inquiries from an accounts clerk of the construction company. He was unable to say whether this clerk had been in the employment of the construction company in 1951, or for whom the clerk worked, the appellant or the construction company. In fact P.W. 4 did not even know when the construction company was formed. He conceded that except for the interview he had with the clerk, and an alleged statement in the clerk's possession (which he was unable to produce), he had nothing to go on relating to the purchase of the land in 1951. In short, he frankly admitted that in preparing his report he did not go into the circumstances relating to the purchase of the land *HKP*.

Fourthly, he said that he had never met CBH or had any occasion to write to him nor CBH to him. He was, therefore, not familiar with CBH's handwriting or his signature. When confronted with his statement in paragraph 9 of his report that he had compared the signatures on the receipts in schedule F to his report with the signature of CBH in an exhibit (page 15 of P. 30) to the deposition and he was of the opinion that the signatures were the same, he conceded that if not for the fact that he had been told that the signatures in schedule F were that of CBH, he could not say that they were in fact so. He was not a handwriting expert. He does not in the course of his duties as a public accountant compare signatures.

Fifthly, he was referred to schedule C of his report. It is an extract of the account of CBH with the construction company. It shows a credit entry in favour of CBH for the sum of $1,380,000 by sale of land *HKP* on 30th of May, 1967. P.W. 4 did not know when the sale was completed. It was in fact completed on the 23rd of May, 1957 (see P.15 referred to in grounds of decision page 6). The account further shows a debit entry of $69,000 on 3rd of June, 1957, whereas in P.15, CBH had acknowledged receipt of the said sum either before or on the 23rd of May, 1957. P.W. 4 agreed with counsel for the comptroller that he could not find any evidence of any interest having been credited in favour of CBH for the sum of $1,311,000 standing to his credit for the period 30th May, 1957 to 15th March, 1960 when the last instalment payment is alleged to have been made as shown in schedule C. There is, however, the contract of sale which stipulates that the construction company shall pay interest to CBH (see grounds of decision page 7).

Sixthly, he was challenged on paragraph 16 of his report where he had formulated the opinion that the entire proceeds received by CBH on the sale of the land *HKP* amounting to $1,380,000 were paid to CBH between 1957 and 1960. He said that the 1959 cheques for $220,000 referred to in paragraph 16 of his report are the two cheques referred to in pages 59 and 61 in P.30. He was then asked:

"Q. Can you say whether these cheques are endorsed by CBH?

A. I don't know. I cannot say that the endorsement on the cheque at page 62 of P. 30 is that of CBH. The cheques are bearer cheques. They can be cashed by others other than by the bearer."

The fact is that the signature appearing at page 62 of P.30. is not the name of CBH but of someone else.

Seventhly, P.W.4 was referred to paragraph 10 of his report where he maintained that he had found evidence of other remittances from Hong Kong to Singapore between 1955 and 1957 totalling $2,750,000. For the year 1955 he relied on a letter dated 4th of January, 1967 from the Chartered Bank, Hong Kong, schedule I of the report, and, for the years 1956 and 1957 he relied on schedules K and L. He was then asked:

"Q. Looking at schedules K and L can you say who made the remittances?

A. I cannot say. Schedules K and L are bank pay-in slips showing that the bank has received the amount stated to the credit of KAH Company's bank account."

Eightly, P.W. 4 was referred to schedule I of his report and to the cash book for the years 1953 to 1956 of the construction company. He was then asked whether the entry of $800,000 in page 3 of the cash book (P.32) alleged to have been received by the construction company on the 8th of October, 1955 tallies with schedule I of his report. He said that it did not. A perusal of schedule I shows that up to 11th of October 1955 only $400,000 had been received by the construction company and not $800,000 as alleged in its books. It is also relevant here to refer to the general ledger (P.33) for the years 1953 to 1956 of the construction company in which the amount of $800,000 claimed to have been received on the 8th of October, 1955 is not reflected in the capital account in the general ledger until 31st of December, 1966 in spite of the fact that this capital account had been "ruled" off for the year 1955.

In this connection I would add that if one studies the transcripts of the evidence of CBH (see page 24 of P.29 and pages 39 — 41 of P.30) and CCM (see page 41 of P. 29 and page 84 of P. 30) taken in Hong Kong, one will find that whilst the minutes of the board of directors of the construction company show that CBH and CCM had been present in Singapore at meetings of the board, they had in fact not been present.

On these findings, I must say that I am not prepared to accept the accounts and records of the construction company as having been correctly and properly written up. It, therefore, follows that P.W.4's investigations cannot be correct or true.

To conclude his evidence, in fairness to P.W.4, it must be said that until he was instructed to prepare the report in December, 1966, he had no dealings

with either the appellant or the construction company. Also, it must be said that his instructions were of a very limited nature in that, as I understand the purpose of his evidence, he was requested to study the depositions and ferret out evidence, documentary or otherwise, in Singapore which could confirm the evidence of CBH and CCM in the depositions. From what has been demonstrated above, and for other reasons which I shall give in dealing with the rest of the evidence presented at the hearing, I find the evidence of P.W.4 of no value on the matters in issue I have to decide.

By a consent order of the board (page 1 of P.30) dated the 17th of September, 1966 the evidence of CBH and CCM were taken in Hong Kong before a special examiner, Mr. David Andrew Leslie Wright, a practising member of the Hong Kong Bar of not less than seven years standing. The depositions (P.29) and the exhibits (P.30) referred to in them were tendered at the hearing. The evidence was taken on the 7th and 8th of October, 1966. CBH and CCM gave evidence in Cantonese which was translated into English and taken down by shorthand writers. It was agreed before the special examiner by counsel for the appellant and for the comptroller that the reading over of the transcripts to the said witnesses and their signatures should be dispensed with. I will now deal with their evidence.

CBH resides in Hong Kong and is by occupation a company director. He is the second son of the appellant. The evidence-in-chief, as agreed by counsel for both parties took the form of a statutory declaration. The declaration is dated the 19th of September, 1966 and is to be found in pages 2 - 4 of P.30. CBH also identified his signature in the contract of sale (see P.18 — referred to in the grounds of decision page 7), a photostat of which was shown to him. He was then cross-examined by counsel for the comptroller.

He was born in China in 1920. At the age of 17, that would be in 1937, he said, he started an import-export business in Amoy on his own accord and independently of his father, the appellant. To do this, he said he borrowed money from a bank. It was not a bank as understood in the Western concept. At that time his father and his brothers too were in Amoy where his father was engaged in the jewellery business. After the War he moved to Hong Kong and took with him from Amoy, he alleged, a few millions of Hong Kong dollars. That would be in 1946. He admitted that in 1949 he had in his possession quite a few millions of Hong Kong dollars.

From 1946 - 1950 he carried on business in Hong Kong, but not in any firm's name. The nature of his business consisted of lending money to people with interest at 1.1% to 1.4% per month, in investing his money in business adventures of his friends, and in speculation. In 1951 he contemplated taking up residence in Singapore, but the intention never materialised.

I will pause here to make some observations. First, I refer to what I consider is very material evidence that came to light in the cross-examination of CBH. It appears from the transcript of his evidence (pages 7 and 8 of P.29) that he was hard put to answer whether he had resided in any other place or country outside Hong Kong or China. After much hesitation (or persuasion) he said that he had lived in Malaya as a child for a long period but was unable to say for how many years. When confronted with two income tax returns for the years 1955 and 1956 (pages 18 - 25 of P.30), he admitted that he had been a resident in Malaya for over 15 years before the War. Having been a resident for over 15 years in Malaya as a child (he was born in China) before the War, it is somewhat surprising that he went to Amoy at the age of 17, started a business from scratch without any direct help from his father, the appellant, and was able to transfer to Hong Kong soon after the War millions of Hong Kong dollars. The second observation I will make is that there is the deed of conveyance dated 23rd November, 1951 (see P. 23 — referred to in grounds of decision page 6) that the land *HKP* was conveyed to him in which the address given, is an address in Penang, not Hong Kong. It would, therefore, seem to me that his statement in paragraph 1 of his declaration and/or his statement in his income tax returns cannot be correct. Thirdly, in the course of the cross-examination he was referred to paragraph 4 of his statutory declaration and asked that if he had millions of Hong Kong dollars in 1949 why had he borrowed $500,000 in 1949 from his father. His answer speaks for himself —

> "A. In business we always want money no matter how much money (we have)".

Fourthly, I refer to the evidence of PPM, the manager of a private bank in Hong Kong who gave evidence before the board on 21st of February, 1963 in Income Tax Appeal No. 3 of 1962 which I have adverted to at the commencement of these grounds of decision. It was his evidence that he had known CBH since 1947 and the appellant since 1948. He said that between 25th of May and 27th of June 1949, over Singapore $4 million was transferred in U.S. currency by the appellant from Amoy, China, to Hong Kong. It is significant to note here that between the 28th May, 1949 and 27th of June 1949, Singapore $1.78 million was transferred from Hong Kong to Singapore (see schedule B of P. 30 — referred to in grounds of decision page 10). It is, therefore, not unreasonable to infer that it was part of the appellant's money which had been transferred from Amoy to Hong Kong that found its way during the same period from Hong Kong to Singapore.

The observations I have made, to my mind, destroy the foundation on which the rest of CBH's evidence stands. I am satisfied, should the matter rest with me, that what I have stated disposes of the evidence of CBH taken in Hong Kong. However, as this appeal may go further I must refer to some other salient features, as I see them, of the rest of his evidence.

It is appropriate that I should, at this juncture, refer to the evidence of two witnesses for the comptroller. D.W. 1 is the chief of the business department of the Bank of China, Singapore. In response to a letter from the comptroller dated 19th May, 1961

(page 1 of D.1), on the 9th of June, 1961 (page 2 of D.1) his bank furnished the comptroller with a copy of the account of the remittance shop with the bank (pages 3 to 19 of D.1), including the name of the person who had the power to operate the account. It was the nephew of the appellant who I will hereinafter refer to as "CYB".

From the account of the remittance shop with the bank I see that from the 28th of May, 1949 to about the 27th of June, 1949 (pages 4 to 9 of D.1), there were remittances of $20,000 each into the said account. They were, D.W.1 said, demand drafts issued by the Bank of China, Hong Kong and paid into the said account by way of "pay-in slips". An official in the tax department made an analysis of the demand drafts for the period 25th May 1949 to 23rd June 1949 and wrote to the manager of the bank in Singapore on the 22nd November 1966 (pages 70 and 71 of D.1) to the following effect:—

"From the above analysis I note that of 1,006 drafts (K3467 to K4472) issued by your Hong Kong branch office from 25.5.1949 to 23.6.1949, 740 of them were received by [the remittance shop], and that these 740 drafts were issued in 17 days in unbroken series of 2, 3, 6, 7, 8, 9, 10, up to as many as 60 drafts in each series, in some days in 3 to 7 series a day and in other days all in a single unbroken series. It is inferred from this that the applications for these 740 drafts were handed in by a remittance agent or remittance agency on behalf of the applicants and I shall be most obliged if your Hong Kong branch office will kindly recheck again their records (including the original applications if these are available) to ascertain whether there is any record or covering note which might confirm that remittance agent(s) or agency/agencies were connected with the purchase of these drafts and if so, kindly let me know the name(s) (and the address(es) if available). If there are letters from the remittance agent(s) or agency/agencies in connection with the purchase of these 740 drafts or any of them, I shall be grateful if a photostat copy of these could be furnished. I shall pay any normal fee that may be charged by your Hong Kong branch office in connection with this work".

On the 28th of December, 1966 the Bank of China, Singapore replied (page 77 of D.1) as follows:—

"... we have received a reply from our Hong Kong office to the effect that the names and addresses of the remitters as shown in the lists forwarded to you in our letter Ref: 2063/66 of 12th November 1966 are copied from those stated in the applications, that all the drafts were purchased with cash over the counter and that they were not handled by any remittance agent or agency".

I will pause here to observe: first, that the remitters of the monies from Hong Kong to Singapore were allegedly hundreds of persons of different names (see pages 53 - 69 of D.1). It is not as stated by CBH in paragraph 4 of his declaration that he remitted the Singapore $1.78 million. Also no money was remitted to his cousin CYB. The monies were remitted to the account of the remittance shop. Secondly, it will be seen from page 42 of D. 1 that between the 28th of May, 1949 and 27th of June, 1949, it was not Singapore $1.78 million but Singapore $2.96 million that had been remitted from Hong Kong to Singapore.

D.W.1 also gave evidence that in the account of the remittance shop under "particulars" the letter "M" denoted "marked cheques". Twenty cheques (D.2) that had been issued by the remittance shop between the 30th of May and the 24th of June, 1949 were tendered in evidence. Thirteen of them were made out in favour of Lee Wah Bank totalling $3,240,000, five cash cheques totalling $230,000, one cheque to a named person for $150,000 and the last to a company for $100,000.

As regards the cheques made out in favour of Lee Wah Bank, there was the evidence of D.W.2 who had been an employee of the said bank from September 1933 to May 1952. In the years 1948 to 1952 he was the sub-accountant of the foreign exchange department in the bank. His signature is endorsed on each of the thirteen cheques. He said that the cheques endorsed by him are for remittances out of Singapore, probably Hong Kong. He was definite that the cheques were not to be credited to the current account of the bank. He admitted under cross-examination that most of the records of the exchange department of the bank were not available. Be that as it may, I accept his evidence for it must be assumed that the functions or duties of a foreign exchange section or department of a bank are to deal with monies for transfer to outside Singapore. Also, a remittance shop being what it is that engages in the trade of remitting money would remit money from Singapore to outside Singapore.

I should mention here that counsel for the appellant objected to both D.1 and D.3 tendered by D.W.2, being admitted in evidence on the ground that the information contained therein had not been put to the witnesses in Hong Kong. I did not agree with him and allowed them. It seemed to me, in the circumstances of this appeal, the appellant not having given any evidence before the board, the comptroller is not in a position to demonstrate to the board the justification of his assessment. In any event, I did not consider it a serious objection that the witnesses in Hong Kong were not given an opportunity to know what evidence the comptroller had in his possession. Being persons of very substantial means they could, with ease, come to Singapore, give evidence before the board, hear what evidence the comptroller has, and rebut it, if they can. For reasons best known to themselves they have elected not to do so, as has the appellant.

For the comptroller there was also tendered as documentary evidence D. 5 which consists of a letter written by the former solicitors of the appellant to the comptroller dated 6th of June 1961 and documents contained in pages 26 - 35 in P.30 Counsel for the appellant had no objection to all the documents or the letter, except the statutory declaration of CYB which is referred to in pages 26 and 27 of P.30. The objection taken before the board is the same as the objection taken before the special examiner in Hong Kong, namely, that unless the comptroller was calling CYB as a witness he should not be permitted to introduce the statutory declaration that had been made by him. The objections of counsel had been taken down in shorthand before the special examiner (pages 18 and 19 of P.29) and I cannot put it better in my own words than to quote:

"(Reasons) for my objection are quite simple, that this is a document made by a witness who apparently may not be called. He has stated in the document to be resident in Penang, and is therefore, if he is still resident in Penang, outside the jurisdiction and cannot be subpoenaed. It is therefore on the face of it impossible for the comptroller to pro-

duce him as a witness to prove it. The reason sir that we are here examining these two witnesses on commission is because the comptroller will not accept a statutory declaration without the right to cross-examine. In my submission a perfectly correct view for him to take, and exactly the position I am now taking in regard to this document, and I merely ask application of normal rules of evidence that the maker of the document be produced as a witness".

There are, in my view, serious objections to this submission. First, under section 80(5)(d) of the Ordinance this board need not follow the rules of evidence observed by the courts. It must, however, observe the rules of natural justice. Secondly, even in the courts, depending on the circumstances, statutory declarations may be accepted. The courts will not, rightly, accept a statutory declaration made for the particular purpose in lieu of evidence on the issues a court has to decide. If, however, a statutory declaration had been made many years ago for purposes not directly connected with the issues before the court, and it contains matters that may now throw light on the issues to assist the court in arriving at a decision, if my understanding of the rules of evidence and the practice of the courts is right, the court will receive such evidence. I ruled that the statutory declaration of CYB be admitted. It was made on 24th May, 1961 and was for purposes not connected with this appeal. Paragraphs 4 and 5 of the declaration are to my mind very relevant. They are as follows:—

"In or about the year 1949 my uncle [the appellant] who was in Hong Kong at that time, remitted to me in Singapore sums of money in bank drafts of $4,000 each, these sums totalling $1,780,000 and requested me to keep them for him as his agent. I paid all said drafts into my banking account with the Bank of China Singapore. I produce a photostat copy of a letter dated the 1st March, 1960 written to my business [remittance shop] by Bank of China together with my bank statement with Bank of China showing the said amount and annex hereto. These monies were my uncle's monies.

After my uncle's return to Singapore in 1951 he bought landed properties with part of the monies he entrusted to me aforesaid and I paid the balance thereof to him from time to time until I left for Penang in 1954".

In the letter of his former solicitors dated 6th June, 1961 (D.5) written to the comptroller, the appellant through his solicitors took the stand that Singapore $1.78 million were his own monies, that they were transferred from Amoy via Hong Kong to Singapore, that it was capital and not income, and, that he bought landed properties with part of the monies. Now, before this board, the appellant seeks to take a different stand. It is said that the land *HKP* was bought by CBH or, in the alternative, was an advancement by the appellant to CBH, and, that the land *KLP* was bought by CCM.

I have read and re-read many times the transcripts of the evidence of CBH and CCM taken in Hong Kong. I find that there is nothing much in them to be desired. I have referred to some of the evidence of CBH. As regards CCM, I refer to the following questions and answers which are to be found in pages 42 and 43 of P.29:—

"Q. [CCM], can you look at the 3rd schedule (Exhibit HK.22) in your affirmation which shows a debit of 5% amounting to $127,788.46 dated 18th May 1959. [This refers to part of the purchase price of land *KLP* received and acknowledged by CCM in Hong Kong (see P. 11 referred to in grounds of decision page 9)]. What happened to this sum, was it remitted to you [CCM]?

A. It was not remitted to me, but went to my account with [construction company] paid into my account.

Q. And a further sum debited to you in April 1960 amounting to $14,064.37 being a payment to [construction company].

Q. [CCM], can you please look at the 3rd schedule (Exhibit HK. 22), this is your account with [construction company]. According to this account, in May 1959 a payment was made by [construction company] to you amounting to $127,788.46 cents. This sum was debited in your account. Can you state what happened to this sum?

A. There are so many figures and so many sums of money, I cannot remember exactly what happened to it.

Q. Did you keep an account with your father in regard to this piece of land?

A. No.

Q. Did your father keep an account?

A. I believe he had no account.

Q. I produce this statement by your father showing your account with your father for the period 1st January 1959 to 4th March 1959.

A. I do not know about it.

Q. This statement shows that on the 31st December 1959 a sum of $23,690 was due to your father from you.

A. This is a very small amount, I cannot remember.

Q. On the same date, your father gifted you this debit. Your father in adjusting the accounts with you wrote-off this sum as a gift to you?

A. I do not know.

Q. Can you remember whether your father in fact gave you any such gift?

A. I cannot remember.

Q. Is this your father's signature?

A. Yes.

Examiner: Put in and marked Exhibit HK. 28."

I find that their evidence taken independently, and more, together with the documentary and other evidence in this appeal, wholly unsatisfactory. I accordingly reject them.

Before I conclude the evidence given at the hearing, I must refer to two other matters. First, there is a statutory declaration of CYB dated 30th December, 1966 sworn in Singapore before a commissioner for oaths about 9 days before the proposed original hearing of this appeal. It was tendered by counsel for the appellant at the close of the case for the comptroller. Counsel for the comptroller strenuously objected to it. It was said that the declaration having been sworn in Singapore and the deponent living as he does in Penang, he should present himself to be cross-examined. I will say now that I shared the views of counsel for the comptroller. Nevertheless, I allowed it under section 80(5)(d) of the Ordinance so that I and the members of the board could give our best consideration to the facts of this appeal. Also, I took the view that I did not want it said elsewhere that this board did not give the appellant every opportunity to present the full facts to the board. I have read the declaration. I, however, wholly reject the contents for the same reason that our courts would reject them. It was made for the express purpose of

this appeal a few days before the scheduled hearing. CYB lives in Penang. He came to Singapore to make the declaration. Yet he has elected not to give evidence before the board and subject himself to cross-examination. There is a good rule of evidence based on commonsense "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it." It seems to me, in the circumstances, that I should, as I do, invoke it.

The other matter is the evidence of P.W.5 who I will refer to as CKP, another one of the sons of the appellant, and, step-brother of CCM. He is one of the directors of the construction company. He said that he remembered receiving a cheque from the construction company, be it noted, in 1966; and, that this cheque was made out to him on the instructions of his brother, CCM. He was then referred to schedule W of P.31 in which there is a voucher, be it noted. dated 7th of March, 1964 for the sum of $36,000. He said that he presented the cheque back to the construction company (which cannot be) and bought shares from the said company. He was then referred to schedule X of P.31 which he said was signed by him. It is as follows:—

" 15th December, 1966

To Whom It May Concern.

I, [CKP] hereby confirm that I have received from [CCM] on 7th March 1964 a gift of $36,000 with which I have purchased from [construction company] 360 shares of $100 each on 24th March 1964. I confirm also that I am still holding these shares.

Sd: [CKP]."

It is obvious that this document was executed solely for the purpose of this appeal. All considered, I cannot accept his evidence.

On these facts which I have set out at some length, the comptroller says that the appellant was, during the relevant period, engaged in the trade or business of developing land. It was contended that it was in the course of his trade or business that he bought the three pieces of land, paid for them from his own monies, obtained approvals for the development of the land from the appropriate authorities, and, sold the said lands, at considerable profits to himself, to the family construction company. It was contended that the fact that two of the three pieces of land were actually conveyed to the two sons of the appellant, CBH and CCM, who were not residents in Singapore at the material time, were devices of the appellant for purposes best known to himself. It was said that, if at all, the two sons were mere nominees of the appellant. The comptroller contends that the transactions or dispositions between the appellant and his two sons, as regards the said lands, were artificial and/or fictitious. He accordingly disregarded them acting, as he did, under section 33 of the Ordinance.

For the appellant it was contended that the land in Oxley Rise was purchased by the appellant as a family residence in which he had resided for about fifteen years. It was submitted that the sub-division of the excess land for development purposes does not necessarily mean that the appellant was engaged in the trade or business of developing land. I was referred to three authorities: *Hudson* v. *Wrightson*,[1] *Hudson's Bay Co. Ltd.* v. *Stevens*[2] and *Harvey* v. *Caulcott*[3] and it was argued that the accretion, if there was any, was capital appreciation and not income. As regards land *HKP*, it was contended that it was not bought by the appellant but by his son, CBH, who provided the monies from his own account in Hong Kong. In the alternative, it was contended that the appellant had made an advancement of the land to CBH. It was sold by CBH and therefore the tax should be paid by him and not the appellant. Finally, as regards the land *KLP*, it was submitted that it was bought by CCM from his own funds and was accordingly not that of the appellant. As in the case of CBH, as it was sold by CCM, it was submitted that the tax should be levied against him.

It was argued for the appellant that the appellant need not give evidence as this is not an 'investigation' case. I was referred to certain previous cases heard by the board. Of the four cases, I was told by counsel for the comptroller that he attended three of them. In them the facts were not in dispute. I have read the case of *M.N.O.* v. *The Comptroller of Income Tax*,[4] the last of the cases referred to by counsel for the appellant. That was a case stated where the facts were not in dispute. In *Harvey's* case referred to by Mr. Hill, the appellant gave evidence and satisfied the commissioners that the profits which arose in the transactions, the commissioners had to decide, were realisation of investments and, therefore, not taxable. On the facts before me, the appellant is the person who is aware of all the facts and the nature of the numerous and varied transactions that he had undertaken during the relevant period. It is he who can explain them. He is, in my view, a vital witness. But he has elected not to give evidence. I must, therefore, infer that if he had given evidence, his evidence would be unfavourable to him.

There was also much argument before the board on the question of onus of proof and when the onus may be considered to have shifted from the appellant to the comptroller generally in tax cases, and especially, under section 33 of the Ordinance. On the facts, I am satisfied that the appellant has not discharged the burden placed on him under section 80(3) of the Ordinance which has been the subject of judicial pronouncement in the case of *A.B.C.* v. *The Comptroller of Income Tax, Singapore*[5] at p. 166 —

"By section 80(3) of the Ordinance the onus of proving that the assessment is excessive is placed on the appellant taxpayer. The principle involved was enunciated by Ag. C.J. Isaacs of the Australian High Court in *Federal Commissioner of Taxation* v. *Clarke* at p. 251 as follows:

'The justice of that burden cannot be disputed. From the nature of the tax, the Commissioner has, as a rule no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to the circumstances'.

If the taxpayer fails to discharge it because he has conveniently lost his memory or his books or failed to keep proper books he must take the consequences. The onus on the appellant here is not only to show that the assessment is wrong but what must be done to put it right. The taxpayer appellant does not rebut the presumption merely by showing that there is an error in the assessment and thereby

creating a blank — he must go further as was indicated in *Trautwein* v. *Federal Commissioner of Taxation* and show either that there ought to be a blank — a complete omission of the item in question, or that something else should be substituted for that item".

For the reason I have given, I need not deal with the fine and difficult question, *in vacuo*, as to when the onus of proof may move from the appellant to the comptroller.

I must now consider section 33 of the Ordinance with reads as follows:—

"33.—(1) Where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.

(2) In this section 'disposition' includes any trust, grant, covenant, agreement or arrangement".

There is no judicial authority in Singapore on this section. There is, however, the case of *Comptroller of Income Tax* v. *A.B. Estates Ltd.*,[6] a decision of the Federal Court of Malaysia on section 29 of the Income Tax Ordinance of Malaya which is identical to section 33 of our Ordinance. Mr. Justice MacIntyre delivered the judgment of the court. In it he points out that there is no corresponding section in the Income Tax Acts of the United Kingdom to their section 29. He was, however, referred to section 260 of the Income Tax and Social Services Contribution Assessment Act 1936 - 1962, and it was compared with section 29. He was also referred to a decision of the Privy Council made on the Australian section. I have considered this case.

In *Newton* v. *Commissioner of Taxation*,[7] Lord Denning who delivered the judgment of the Privy Council had this to say on section 260 of the Australian Act at page 466:

"In order to bring the [contract, agreement or] arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. ... But when one looks at the way the transactions were effected in *Jaques* v. *Federal Commissioner of Taxation*, *Clarke* v. *Federal Commissioner of Taxation* and *Bell* v. *Federal Commissioner of Taxation* — the way cheques were exchanged for like amounts and so forth — there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

Applying these principles to the present case, the first question is — Was there any arrangement? The answer is "Yes". The whole complicated series of transactions must have been the result of a concerted plan; and the nature of the plan is to be ascertained by the overt acts done in pursuance of it".

Again, at page 467 Lord Denning said:

"Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by section 260. The whole of the transactions show that there was concerted action to an end — and that one of the ends sought to be achieved was the avoidance of liability for tax.

This question then arises: What is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the commissioner. ... The commissioner is entitled completely to disregard the arrangement — and the ensuing transactions — so far as they have the purpose or effect of avoiding tax".

The issue before the Federal Court was whether a lease entered into by the respondents, a limited liability company, with its subsidiary company whereby the respondents leased to the subsidiary company at an uneconomic rental, a rubber estate, was a transaction that was artificial within the meaning of section 29 of the Income Tax Ordinance. "If the lease is artificial within the meaning of section 29 of the Ordinance it is immaterial whether it is legally enforceable or not". Having considered the nature of the transaction as a whole, from the beginning to the end, he held that the lease was artificial for the purpose of section 29.

What I have to consider is whether, on the facts, it can be said that the arrangements made by the appellant whereby land *HKP* was conveyed to CBH and land *KLP* to CCM are artificial or fictitious within the meaning of section 33 of the Ordinance. I am satisfied that the transactions are not artificial. Can they be considered to be fictitious?

"Fictitious" is defined in the *Shorter Oxford Dictionary, inter alia*, as: artificial; counterfeit; sham, not genuine. As the section draws a distinction between artificial and fictitious, fictitious in the context of the section must mean sham, not genuine. I must, therefore, consider the whole of the transactions of the appellant from the beginning to the end to see whether they can be said to be sham or not genuine, executed or carried out, for the purposes of avoiding income tax.

The facts as I find them are as follows. When the appellant came to Singapore, about 1951, there was in his possession $1.78 million for his use in Singapore. In December 1951, he bought the land at Oxley Rise consisting of 211,313 square feet for $470,000. Immediately upon the purchase, he applied to the then Singapore Improvement Trust to sub-divide and develop a portion of the said land. Earlier in October 1951 he entered into a contract of sale to buy the land *HKP* consisting of over 30 acres for $300,000. On the day of the conveyance of the land, the appellant changed his mind, for reasons best known to himself, and, most of the land was conveyed to his son CBH who was not a resident of Singapore. In 1957 the appellant entered into a contract of sale on behalf of CCM to purchase the land *KLP* consisting of 1,122,770 square feet for $853,305.20. He did not have a power of attorney to act on behalf of CCM. All the negotiations for the purchase of the land and the subsequent applications for planning approvals were dealt with by the appellant. The land itself was conveyed to CCM who was not a resident of Singapore. Between May and July, 1957, part of the land of Oxley Rise and the land *HKP* were sold to the construction company, the latter at a profit of $1,400,000. I am not satisfied on the evidence that CBH received the purchase price. The land *KLP* was sold in June 1959 to the construction company at a profit of $2,555,709.30. There is no evidence that CCM received the purchase price. During the said period the appellant was the chairman of the board of directors of the

construction company. The address of the construction company was the same as that of the appellant's residence, until he moved to Oxley Rise, when the construction company too changed its address of business to an address at Oxley Rise. It would appear that there were five directors of the construction company all of whom were immediate members of the family of the appellant. Two of them, CBH and CCM, never attended any meetings of the board though they are shown in the minutes of the meetings as having been present. The books and accounts of the construction company have not been properly kept and do not reflect the true position of the construction company. The construction company subsequently built houses on the three pieces of land and sold them to the public, presumably at a profit. During that period and for many years, there had been much movement of monies of the appellant and other members of his family between Hong Kong and Singapore, and between the construction company and other companies in which the appellant was a director. There were a whole series of complicated transfers and retransfers of monies and other complex transactions that have not been explained, and, probably cannot be explained, except perhaps by the appellant. He has not done so. In the words of Lord Denning, looking at the overt acts of the appellant by which he implemented his transactions, I am of the view that the comptroller was right in holding that the dispositions of the two pieces of land by the appellant to his two sons are fictitious and that the purpose or effect of the dispositions was to avoid tax. He has, in my view, rightly disregarded them, and has sought to tax the appellant in respect of the three pieces of land.

The appeal must be dismissed with costs. The comptroller will, however, have to make the necessary adjustments of the appellant's assessment as regards the land at Oxley Rise on the findings of facts I have made. There is also a small amount in respect of property tax that has to be taken into consideration. I shall leave that to the comptroller.

The taxpayer appealed to the High Court against the decision of the board.

Winslow J.: This is an appeal by the taxpayer concerned against the decision of the Board of Review confirming the comptroller's additional assessments of tax levied in respect of three specific properties alleged to be owned by the appellant.

This case seems to have caused considerable anxiety to every one concerned before the tribunal below, not only to counsel for the comptroller but, as a consequence, to counsel for the appellant as well and to some extent to the learned chairman of the board itself as he himself states. The case already took some time before it was heard by the board, whilst the hearing itself took a number of days, at the end of which the board reserved judgment and delivered that judgment 22 months later.

It will be helpful from now onwards for me to use sub-headings since my judgment on this appeal is a very lengthy one.

Delay of 22 months by board in delivering grounds of decision.

The mere fact that a judgment takes 22 months before it is delivered does not necessarily mean that the judgment must be a bad one although such delay can undoubtedly provide cause for complaint. However, I do not propose to waste much time on this ground of appeal founded on delay because in my judgment there are other more substantial grounds, in the course of my dealing with which, the kind of errors and/or omissions to which delays can contribute may become apparent.

Current appeal did not originate as an investigation case.

The first thing to be borne in mind in relation to this appeal is the fact that this was not an investigation case such as those cases in which the comptroller only states the amount of tax due without particularising the source or sources of the income on which such tax is based. The comptroller in this case, however, saw fit to particularise three sources, *i.e.* gains or profits obtained by way of trade as a result of the purchase and sale of the three properties concerned. The comptroller had one bite at the cherry earlier in 1962, when he did proceed against the appellant on an investigation basis without specifying sources but at that time he did not consider that he had any material on which he could venture to particularise these sources. It is unfortunate therefore that the board said that the appellant withdrew the appeal, in the absence of any information on the record as to what that appeal was all about and what the assessments were. As this was not an investigation case, the comptroller was not entitled (nor was the board) to investigate the movements of monies other than those relating to those particularised as sources of income save insofar as such movements were incidental to those of the specified ones.

'HKP' and 'KLP' properties owned by appellant's sons in Hong Kong.

The one matter of any consequence on which there is incontrovertible and clear-cut evidence is the fact that the two properties — the 'HKP' and 'KLP' properties were purchased in the names of the appellant's two sons who were in Hong Kong. Of this there is no doubt at all. That is supported by their own evidence taken on commission in Hong Kong and by that of solicitors who acted for them in the conveyances concerned, apart from documents.

Failure of appellant to give evidence himself.

One central theme which occurs time and time again in the course of the submissions on behalf of the comptroller which can be seen repeated in the written submissions on his behalf is the fact that the appellant failed to give evidence and thereby deprived the comptroller of the opportunity of adducing evidence of facts, one way or the other, towards filling obvious gaps in the evidence of the comptroller's case against the appellant.

Board held appellant would have given evidence unfavourable to himself.

The other theme which is reiterated is the fact that if the appellant had given evidence he could have corroborated the two sons. The board accordingly came to the conclusion that, if the appellant had in fact given evidence, such evidence would have been unfavourable to himself, which is an amazing conclusion since it presupposes that a witness (however bad a showing he may ultimately make in the witness-box) is going to support the comptroller's case in rebuttal even before it commences.

Onus on Taxpayer.

Under section 80 of the Income Tax Ordinance the onus of proof in these cases lies on people like the appellant to show that tax was excessive, i.e. that a lesser sum should have been imposed by way of tax and, if so, what that sum should have been even to the extent of its being a blank. The appellant in this case has submitted that the sum should have been nil.

With regard to the two properties said to be owned by the sons he claimed that no tax was leviable on them at all so far as he, the appellant, was concerned because he was not their owner. The appellant now claims that he discharged this onus on him, before the board, and that the comptroller failed to rebut his case although the board found to the contrary.

Board held onus not discharged by appellant.

I therefore now turn to this main ground of appeal which I consider will determine the appeal as a whole although I also intend in the course of this judgment to draw attention to some of the other grounds which traverse this main ground or are included in it on issues of mixed law and fact to such an extent as to be invariably involved in its consideration by me as well.

It is contended on behalf of the appellant that once he has shown that the properties as evidenced by the title deeds were in the names of the two sons he has discharged the onus on him of proving that the tax was excessive and of showing that the tax should have been nil.

Mr. G.S. Hill for the appellant therefore contended that, having discharged the onus at the end of the appellant's case it remained for the comptroller to rebut it. In short, according to Mr. Hill, it was up to the comptroller to show that the two transactions were sham, either at common law or as falling within the provisions of section 33 of the Income Tax Ordinance, if relevant.

Whether transactions were sham.

I do not propose to embark here on a discussion of the distinction between "artificial" and "fictitious" transactions as used in section 33. Suffice it to say that the board itself found that the transactions were not artificial but fictitious and I do not wish to be drawn into the controversy which seems to be raging as to whether the decision of the Federal Court of Malaysia in *Comptroller of Income Tax* v. *A.B. Estate*[6] was correctly decided, so far as this particular appeal is concerned. This appeal largely turns on whether the transactions were sham. It is therefore of little consequence whether they were sham at common law or under section 33 and it is quite clear that the onus of proving sham is on the comptroller when he tries to rebut the appellant's contention that the tax was excessive.

Mr. Hill seemed to rely on the proposition stated by Knox C.J. in *Deputy Federal Commissioner of Taxation* v. *Purcell*[8] at page 466 to the effect that the burden was clearly on the comptroller to prove that the transactions were caught by the Australian counterpart of section 33 although on appeal the High Court of Australia did not find it necessary to determine this point as to onus, holding as it did that the transaction in question was never a sham, whoever had the burden in the first instance. Khox C.J. said:

> "On this point it is clear that the onus is on the respondent to establish facts from which the court may, and should, conclude that the transaction is within the class struck at by the section (260's predecessor). The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer; but, in my opinion, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognized as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth *his* income."

First, 'HKP' and 'KLP' properties, then Oxley Rise land.

It will be useful at this stage to confine my observations to the 'HKP' and 'KLP' properties which on the documentary evidence at least were once clearly owned by the two sons in Hong Kong. I shall deal at a later stage with the Oxley Rise property which, as I have already said, is admittedly owned by the appellant. Before I leave Oxley Rise, however, and return to the other two properties I should like to confirm what Mr. Hill said with regard to errors of memory and recollection which can occur when judgment is delayed for as long as happened in this case. Despite clear evidence on the part of two witnesses at least that the residence occupied by the appellant and his family was very much in existence, the chairman of the board in his grounds states quite categorically that the family house had been demolished. On this more anon whilst I return to the properties owned by the sons, as follows.

As I have already said this was not an investigation case. It concerns three specific items, two of which relate to the properties owned by the two sons and the appellant's contention is that each of these two items should be entirely deleted in the assessment of tax. Where, however, the comptroller has particularised the sources he is not at liberty to treat the case as an investigation case and thereby to require the appellant to establish exactly what his income was from all sources.

Prima facie case established re. 'HKP' and 'KLP' by appellant's case.

In my view, at the end of the appellant's case he had established a *prima facie* case that tax was excessive in respect of these 2 items. At that stage the comptroller had not introduced any evidence in rebuttal nor had his evidence yet been heard.

Important evidence including documents not challenged by comptroller.

I agree with Mr. Hill that the basic evidence regarding the 'HKP' property was that of the appellant's son Ming Fai in Hong Kong to whom it was never suggested that the transaction was a sham or that monies remitted from Hong Kong to Singapore were not sent by him. Similarly, with regard to the 'KLP' property the basic evidence is that of CCM, another son in Hong Kong, to whom it was never put that the transaction was a sham or that the monies remitted to Singapore were not his.

It is significant that the authenticity of the various documents set out at paragraph 2(ii) at page 9 of the written submissions of the case for the appellant has never been queried. There is the undoubted fact that the title deeds showed that the ownership was with Ming Fai. Moreover, Ming Fai's evidence that the proceeds of sale of this property remained throughout under his control was never queried. Similarly, the authenticity of the documents set out at paragraph 2(ii) of the written submissions of the case for the appellant at page 15 has never been queried.

When court can review findings of fact.

The question for determination by the board was therefore whether the comptroller had rebutted the appellant's case. I shall deal with this later after setting out my reasons for deciding that this court has power to review the evidence before the board where the latter has applied incorrect principles of law or of natural justice before reaching its factual findings. Findings of fact alone are of course unassailable if correct principles have been applied beforehand but, if the board has erred on matters of this kind, its decision can be reviewed.

Burden of proof on taxpayer to prove tax excessive on case as a whole.

It follows from what I have said that I agree generally with Mr. Hill on the question of the burden of proof and how it is discharged, though not necessarily with the language in which he expresses his views. I agree, however, that the nett result is, in the long run, the same. It is difficult to divorce from one's mind consideration of the other ground, ground 17, relating to the fictitious nature of the transactions and/or dispositions complained of and it is as well for me to deal with this question as a whole.

How does the taxpayer discharge the onus on him of showing that the tax levied on him is excessive? Does he establish in the course of his case that he has made out a *prima facie* case that such tax is excessive and does it then remain open to the comptroller to lead evidence showing that he has not in fact made out such a *prima facie* case? If therefore the comptroller succeeds in rebutting this *prima facie* case does he have to go any further and try to prove that the dispositions were sham within section 33 of the Ordinance? (He may, of course, have proved sham in the course of rebuttal).

The answer seems to me that the comptroller, in such circumstances, would succeed without going further than rebutting the taxpayer's case. The taxpayer would then not have discharged the burden on him as a whole.

In the course of the comptroller's case in reply to the *prima facie* case made out by the taxpayer showing among other things that everything was above board and genuine, it would be open, however, to the comptroller to deal with the applicability of section 33 as well. The comptroller's "defence" so to speak, is therefore double-pronged.

In a way it can be said, having regard to the line taken by the appellant in the course of this case, that he claimed that the transactions were genuine. Both matters can therefore be dealt with together, although, even without adducing evidence in rebuttal as to who actually paid the monies etc.— the appellant or his sons — it would still have been open to the comptroller to show that the transactions were sham. The burden of proof throughout until the end of the comptroller's case, however, rests on the taxpayer to show that the tax is excessive.

Standard of proof in tax cases.

This brings me to the question of the standard of proof required in tax cases because, at one time before the board, it appears to have been suggested that there was a third standard falling between the civil and criminal standards of proof i.e. higher than a balance of probabilities but lower than proof beyond reasonable doubt. That approach was not pursued on appeal but nevertheless the seeds of poison with regard to this third standard had already been sown in the minds of members of the board. I can only hope that the chairman who was also the First Civil District Judge applied the correct standard appreciating as I do that there are degrees of proof even within the same standard which cannot be resolved by the application of a mere mathematical formula.

Counsel for the comptroller, Mr. Sat Pal Khattar, who, unfortunately, did not have the conduct of the proceedings before the board which was handled by his predecessor, Mr. Amarjit Singh Verick, considered this a rather important ground and conceded that the onus on the taxpayer is undoubtedly heavy but he did not particularise exactly what he meant by "heavy".

Comptroller's submissions on appellant's failure to give evidence.

In Part III of his written submissions (Ex. R.W.S.) in reply to the appellant at pages 24-26, he had the following to say on the onus of proof and its discharge:

"If the evidence had been in this case completely satisfactory and the appellant had played no part in the two major items of purchase and sale and that the two sons had clearly sent their own monies to buy the 2 properties and received the

proceeds, the appellant might well have been held to have discharged the onus by the evidence of the two sons alone. Such is not the case here.

"Appellant features in all these transactions and movement of funds and if he has chosen to rely only on the rather vague and incomplete testimony of his two sons in Hong Kong without him explaining the part that he played in these proceedings and perhaps to corroborate substantially what the sons were saying, then, he must be taken to have invited the consequences upon himself of not having discharged the onus of proof that is legally upon him. The clearest authority on this point is the case of *Farrard* v. *Satterweithe* 14 T.C. on page 472..."

"It is the appellant's duty to satisfy the Board of the facts, and it is entirely his fault if this case was not presented in the way it should have been..."

"Again in *Amis* v. *Colls* 39 T.C. 148 the court considered the problems of an absentee appellant and held that the commissioners were entitled to attach weight to the fact that appellant herself did not give evidence. The risk of unfavourable inferences is open where the appellant taxpayer does not give evidence and the High Court confirmed this. See page 163 of the report..."

Counsel for the respondent then went on to say that there were too many gaps in the evidence before the board which could have been settled by the appellant had he chosen to do so. It is clear from page 26 that there were a number of fascinating questions which could have been put to the appellant had he given evidence. He concludes:

"All these remain lost in the mind of the appellant and the board rightly came to the conclusion that since he has chosen not to give this very relevant evidence which he could have done with ease, the inference to be drawn is that had he given this evidence it might have been unfavourable to him. appellant could have been the only person who might have, if his story is true, helped to fit each jig-saw into this puzzle which is quite incomplete as the evidence stands."

It should be noted that the chairman in his grounds drew the inference from the appellant's failure to give evidence that if he had elected to give evidence it *would have been* unfavourable to him, *not "might"*.

Cross J. on a defendant's failure to give evidence in denial of plaintiff's case and standard of proof.

Cross J. in *Amis* v. *Colls*[9] said:

"A point has been raised as to the standard of satisfaction necessary in such a case as this. Mr. Karmel argued that, as the conduct alleged might have formed the subject of criminal proceedings, the proper standard is not satisfaction on the balance of probabilities, as is the normal test in civil proceedings, but satisfaction beyond reasonable doubt, the test in criminal cases. I should have thought that, as these are civil proceedings, the civil standard was the proper one to adopt, but I am prepared to assume for the purposes of argument that the Commissioners had to be satisfied beyond reasonable doubt...."

That was a clear case where the Inspector of Taxes led evidence in the first instance as to wilful default or fraud in connection with certain returns. The taxpayer did not make any submission through counsel that there was no *prima facie* case to answer and gave no evidence herself at all. Cross J. continues:

"Mr. Karmel came very near to submitting to me that the commissioners were not entitled to attach weight to the fact that the Appellant herself did not give evidence. I cannot accept that suggestion for a moment. Counsel who appeared at that time for the taxpayer might, I suppose, have submitted at the close of the Inspector's case that there was no case for her to answer. If he had made that submission I do not know what the result of it would have been, but he did not do so, and he therefore ran the risk of unfavourable inferences being drawn from the fact that the appellant gave no evidence about matters which were peculiarly within her knowledge. How can I say that no reasonable men could feel satisfied, even beyond reasonable doubt, if that be the proper test, that here there had been wilful default?..."

I propose to follow what Cross J. said as to the civil standard which is universally accepted both in England and in India. I have been unable to find any rigid rule with regard to the standard of proof in such cases in Australia. In *15 C.T.B.R. Case 83*[10] the board held:

"The proof required in criminal proceedings is proof beyond all reasonable doubt; but 'the burden of proving that the assessment is excessive', which, by section 190(b) lies upon the taxpayer, does not contemplate proof to this degree. It is our opinion that if Mr. 'D' has given sworn evidence that he incurred expenditure in connexion with any of the properties under consideration but is unable to support this by reference to book entries, receipts, or vouchers, and that evidence has not been contradicted by another witness and there has been nothing in his demeanour or otherwise upon which properly to found a belief that it is untrue and unreliable, then the board should accept his evidence unless it is inherently unreasonable and improbable in respect of the matter of which he has spoken".

In *Hines* v. *F.C. of T.*[11] allowing the appeal, the full court held:

"The burden of proving a negative is not, as a rule, easily discharged, but in this case it could not fairly or reasonably be said that Hines had failed to discharge it. The case must be decided on the evidence, and on the evidence there is a very definite preponderance of probability in his favour".

It would therefore appear that even the Australian attitude in these matters does not differ substantially from what I have already said.

Inference from failure of witness outside jurisdiction to give evidence.

Whilst I am dealing with the question of burden and standard of proof in these cases I might as well dispose of two other grounds of appeal which can be considered here and now, *i.e.* grounds 13 and 15 respectively, that the board was wrong in assuming that the evidence of CYB was evidence which could have been produced and in invoking an adverse inference therefrom, and that the board was also wrong in inferring that if the appellant had himself given evidence, his evidence would be unfavourable to him.

Presumption in section 115, Evidence Ordinance, illustration (g).

The board relied on illustration (g) of section 115 of the Evidence Ordinance which reads:

"that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;"

Counsel for the appellant does not dispute that this presumption exists. He contended that this presumption is based on the principle that if a man wrongfully withholds evidence every presumption to his disadvantage consistent with the facts admitted or proved will be adopted as stated by *Sarkar* on Evidence, 11th Edition page 995 about 7th line from the foot thereof where he cites *Williamson* v. *Rover Cycle Co.*[12]

In that case the plaintiff Williamson bought a bicycle under a contract of guarantee as to excellence

of material workmanship. But after using it for one year the steering tube broke clean across and caused injury to the plaintiff of which he complained. He and two witnesses, including an expert called on his behalf, had examined the parts in question and were satisfied that there was no defect. The bicycle was then sent to the defendants from whom he had originally bought it, for inspection. The defendants replaced the broken parts and threw them away.

Holmes L.J. at page 625 *et seq* said:

"There is no doubt that the plaintiff has been prevented by the action of the defendants from producing at the trial the broken parts of the machine; and that in certain circumstances the plaintiff would have been entitled to rely strongly on this fact is undoubted. For example, if the plaintiff had given some evidence of a defect in materials or workmanship which was encountered by other evidence, the non-production of the broken pieces *would probably have been* fatal to the defendants' case. But I know of neither authority nor principle for the proposition that in a case like the present the destruction or withholding by one party of something which, if produced, *might or might not* afford evidence on a particular issue, will in itself supply evidence which would otherwise be entirely wanting."

It should be noted that *Sarkar's* proposition referred to earlier appears to go further than this. The more correct *ratio* to be deduced from *Williamson's* case would, in my view, be as follows: If a party wrongfully withholds evidence a presumption to his disadvantage and probably fatal to his case may be adopted if consistent with the proved facts.

Even Fitz Gibbon L.J. at page 619 says,

"Those broken pieces having reached the custody of the defendants as they did, I think that the Chief Baron was right in holding that when the defendants, in a sense wrongfully, allowed them to be destroyed, the law would raise a presumption that an inspection of them *might* support the plaintiff's case."

I emphasise the word "might".

Inference to be drawn, at its highest from appellant's failure to give evidence.

One can therefore appreciate why counsel for the comptroller before me in Ex. 'R.W.S.' said in this appeal that the court might draw an unfavourable inference from the appellant's failure to give evidence though whether he said so as a result of studying *Williamson's* case or not I cannot be sure. What I would like to say is that I think he was correct and that the board was wrong in using the expression "would" instead of "might" and I hold accordingly that that is the highest at which the matter can be put to the appellant's disadvantage on his failure to give evidence.

My decision on weight to be attached to appellant's case as a result of appellant's not giving evidence

The latest pronouncement on the inference to be drawn from the failure of a defendant to give evidence before a court is contained in the latest judgment of the Privy Council delivered on 4th May 1971 in *Ramoo* v. *Gan Soo Swee & anor.*[13] delivered by Lord Cross of Chelsea.

The following portion from the judgment I think speaks for itself as to the proposition relating to failure of a defendant to give evidence:

"According to the evidence the traffic lights facing the taxi driver were changing colour very quickly; he was driving down a straight road; and there was nothing to obstruct his view of the lights. If he had been keeping a proper look-out he would — one would suppose — have realised that the lights were out of order and have slowed down at the crossing — but in fact he continued to drive on to the crossing at about 40 miles an hour. In the absence of any evidence from him as to when he first saw the lights and what impression they made on him the natural inference is that he was not keeping a proper look-out and that his failure to keep a proper look-out caused or contributed to the accident. The Federal Court in the passage in their judgment which has been quoted above attach importance to the fact that the plaintiff said in evidence that he noticed nothing unusual about the lights. But the plaintiff was a passenger who was under no duty to keep the lights under observation and he said that he was no more than 15 yards away from them when he first saw that the light was green. Their Lordships do not think that his evidence is inconsistent with the judge's finding that the taxi driver should have realised that the lights were out of order. Their Lordships also are unable to agree with the view expressed by the Federal Court that the plaintiff in order to succeed should have adduced evidence to the effect that the lights were changing so quickly that the taxi driver if he was keeping a proper look-out must have realised that they were not functioning properly. On the evidence of the police officers coupled with the failure of the taxi driver to give evidence himself the judge was in the view of the board justified in drawing the inferences that he did draw."

It seems to me that the inference to which Lord Cross refers is in relation to the failure of the taxi driver to give any evidence, an inference contained in illustration '(g)' to section 115 although he has not said so in such specific terms. In the case under reference, two police officers saw the lights changing quickly. It was accordingly incumbent upon the defendant taxi driver to deny this state of affairs. He did not give this evidence and accordingly there was no denial. The presumption was accordingly drawn because it was consistent with the proved facts. Now had the plaintiff given no evidence that the lights were green as the taxi approached the junction, and had the police officers not given any evidence as to the changing lights it would seem that the failure of the defendant to give evidence would have justified no such presumption because the evidence on this point would have been nil on both sides.

This is very far from being the case in the current appeal before me in the sense that a number of witnesses have in fact given evidence that the properties were owned by the two sons. If it was the comptroller's contention that the properties were not in fact owned by the two sons he should have led some evidence as to this so as to create a conflict of evidence or to rebut the appellant's case. The clear documentary evidence coupled with the evidence of the solicitors concerned — matters which the board never mentioned once in the course of its lengthy judgment — makes it clear that the properties were owned by the two sons. The appellant never owned the properties at all. If as I hold for the reasons I will state later the evidence for the appellant as given by his two sons and some of the other witnesses is acceptable then of course there can be no question of the father's ever having owned these properties save in one sense *i.e.* in relation to 'HKP'

he was at one stage a purchaser under the contract of sale of 1951 which circumstance made him at best an equitable owner. But the legal interest in the property was never vested in him. I shall return to this later.

The highest at which the matter can be put on the facts is that the appellant's case could have been made stronger than it already was if he had himself given evidence. There was no duty on him then to deny anything as in the case dealt with by Cross J. The weight to be given to his case however might have suffered to the extent, if any, that his witnesses and the documents adduced by him did not bear out all that could have been desired in proving that the tax should have been nil in relation to 'HKP' and 'KLP'.

CYB. not withheld by appellant.

In the case of CYB., the appellant's nephew, it is clear from the record that this witness was unwilling to give evidence even on behalf of his own uncle. Resident as he was in Penang, which is outside the jurisdiction, there was therefore no means of compelling him to give evidence before the board. There was nothing the appellant could have done in this behalf. Counsel for the respondent who appeared before the board himself at one stage was toying with the idea of calling him as a witness until he himself discovered that it was impossible to get him before the board. The board at page 112 of its grounds of decision ruled that there was a good rule of evidence based on commonsense and referred to illustration (g) of section 115 of the Evidence Ordinance and the chairman proceeded to invoke this rule. In this he was clearly wrong.

This may explain why the board accepted one of the statutory declarations which was made in 1961 annexed to Ex. P36 and marked schedule 'A', and rejected another which he made 9 days before the hearing (P36). In my view both declarations should have been read together and a decision made on the facts contained therein viewed as a whole without accepting everything in the one and rejecting the other outright after both had been admitted especially as the latter was attempting to clarify the former having regard to the circumstances in which they were respectively made.

Evidence not adduced before the board taken into consideration.

I would now refer to ground 8 relating to the board's reliance on extraneous evidence.

In the board's grounds of decision, for the first time on the record, reference is made to the evidence of PPM, now referred to by name by counsel for the appellant as Poon Pok Man, the manager of a private bank in Hong Kong, who gave evidence before the board in 1963 in Income Tax Appeal No. 3 of 1962. This gentleman was never a witness before the board and his evidence in another proceeding was canvassed by neither counsel for the appellant nor for the comptroller. All that counsel for the appellant said in his opening address was that the appellant had substantial business interests in Singapore and Hong Kong and that he had been involved in another case, Income Tax Appeal No. 3 of 1962. That is all that he appears to have said.

As I have pointed out earlier, the chairman of the board in his grounds refers to that appeal as having been part-heard and withdrawn by the appellant.

At page 102 of the record in his grounds he says:

> "It was his (PPM's) evidence that he had known CBH since 1947 and the appellant since 1948. He said that between 25th of May and 27th of June 1949, over Singapore $4 million was transferred in U.S. currency by the appellant from Amoy, China to Hongkong. It is significant to note here that between the 28th of May, 1949 and 27th June 1949 Singapore $1.78 million was transferred from Hongkong to Singapore (see Schedule B of P. 30 — referred to in Grounds of Decision page 10). It is therefore, not unreasonable to infer that it was part of the appellant's money which had been transferred from Amoy to Hongkong that found its way during the same period from Hongkong to Singapore."

This reference to evidence in another appeal behind the backs of both counsel and its utilisation by the board in an effort to discredit the version given on behalf of the appellant is completely unjust, unjustified and should never have been done. The fact that it has been done impels me to comment as follows.

Ming Fai's evidence regarding monies sent by him in 1949 supported.

The board seems to have been overzealous in attempting to demolish the evidence of Ming Fai (CBH) as to his sending monies to Singapore from his father's monies credited to his own account (Ming Fai's account) with the Cheuk Wee Bank, Hong Kong (see pages 403 to 409 attached to Ming Fai's statutory declaration, P30). An examination of the evidence adduced on behalf of the appellant and that adduced by D.W. 1 and D.W. 2 for the comptroller will show that the preponderance of probability is in favour of the version of Ming Fai on this issue and that it was part of his father's monies (HK$4 million) which were lying to credit of Ming Fai's own account which he sent to Singapore even though he says that the monies were sent to CYB., his cousin, with whose two statutory declarations I have already dealt. PPM, according to the board's grounds, sent Singapore $4 million then (but see page 403 signed in the same name). In the earlier statutory declaration of 1961, which the board accepted, CYB. claimed that the monies (Singapore $1.78 million) were sent by the appellant himself to the firm of Tong Hong Sin Keok, a remittance shop in Singapore, carried on by CYB. In my view, reference by Ming Fai to Yin Beng as the person to whom he sent Singapore $1.78 million belonging to his father is an understandable though not very satisfactory reference to the remittance shop carried on by Yin Beng and I think the board made too great an issue of this discrepancy in order to discredit Ming Fai. But to look at the record in another appeal — a case of an investigation nature — and to use evidence recorded therein was unpardonable and went far beyond the latitude given to the board in the matter of admitting evidence even without that meticulous adherence to the rules of evidence by which the courts are ordinarily bound.

I do not know exactly what the chairman of the board means by "schedule B of P30" or by "grounds

of decision page 10" in the passage quoted referring to PPM. Does he mean schedule B of P31 at page 498 *et. seq.* because P30 has no schedule B. There is yet another exhibit which refers to similar drafts totalling $1.78 million and which is mentioned in paragraph 4 of CYB.'s declaration of 1961 and included in P30 at page 424 *et. seq.* The declaration is marked HKA by the examiner in Hong Kong. There is annexed a copy of the Bank of China's letter of 1st March 1960 enclosing lists of drafts totalling Singapore $1.78 million addressed to the remittance shop. The list of draft numbers commencing at 3484 and ending 4472 is the same as in P30 second schedule and P31 schedule B.

It seems clear to me that by schedule B to Ex. P30 the chairman meant the list and the letter attached to CYB.'s statutory declaration of 1961 marked HKA at pages 424 to 433 and that he must have been looking at this particular letter of 1st March, 1960 and the list that follows. He could not have looked at the letter which appears at page 406 which is the letter from the Bank of China in Hong Kong addressed to whom it may concern. The chairman has never mentioned it anywhere.

Board overlooked Bank of China's certificate of 20th June, 1961 regarding remittances.

This exhibit is attached with the list of drafts by their numbers and appears as the second schedule to CMF's statutory declaration also included in P30. This certificate dated 20th June, 1961 reads:

"At the request of Mr. CBH of No. 18 Bonham Strand, West, Hong Kong, we hereby certify that the demand drafts numbered in the attached list were issued by this Bank on our Singapore Office each for ST$4,000.00 totalling ST$1,780.000.00 on the respective dates as shown therein."

Comptroller's change of his stand regarding these remittances between 1966 and 1967.

It is interesting to note at page 30 of the record that counsel for the comptroller divulged that he had no instructions at the time of CMF's examination in Hong Kong in 1966 that the monies were not in fact sent by him. It would therefore appear that although there was some material in the hands of the comptroller much earlier than 1966 it was not until towards the latter part of 1966 that he really commenced serious investigations as to the origin of the monies sent from Hong Kong (See Ex. D1 at page 628 *et seq.* and in particular at D1 at page 656 dated 22nd November, 1966 to which a reply was received at D1 page 663). The line of inquiry take by the comptroller was to ascertain who sent each of the drafts in question and the reply from the Bank of China at page 663 of Ex. D1 shows that these drafts were purchased with cash over the counter and that they were not handled by any remittance agent or agents. It was not until 1967, after the investigations to which I have referred, that the comptroller was in a position to change his stand which had previously been quite different. The board in its judgment confused itself in the paragraph relating to PPM's evidence. I think the board was trying to say that the Singapore $1.78 million had in fact been sent from Hong Kong by the appellant himself and not by Ming Fai. That is the new stand.

Evidence for comptroller regarding bank's respect for customer's confidence.

I would emphasise the importance of the evidence of D.W. 1, first witness for the comptroller. Now this witness, Kao Wei Tseng, said at page 42 of the record in cross-examination that he was familiar with the remittance shop in question by name and he said that his bank, like all banks, respected the confidence of customers. He said the comptroller has special powers but that a third person *cannot* get such information. This applied to all branches.

If D.W. 1 is correct, the question arises how did CBH (i.e. Ming Fai) receive this information from the Bank if the monies were sent by 445 remitters when, according to his evidence, he paid cash to the value of Singapore $1.78 million to the Bank of China in Hong Kong. The inference is almost irresistible that he was the customer.

This same bank supplied him with a certificate at page 406 of the record divulging the list of draft numbers as numbered in the list attached of the monies remitted by 445 remitters to Singapore.

Ming Fai's veracity vindicated.

In my view this evidence adds up very strongly in favour of the truth of what Ming Fai has said with regard to his sending Singapore $1.78 million out of the credit account which he possessed with Cheuk Kee Bank in Hong Kong which included monies previously transmitted to him from China by his father, the appellant.

In the grounds of decision at page 105 of the record, the board explains its reasons for deciding that the Singapore $1.78 million was not sent by Ming Fai. One of the reasons it gives is because remittances were made to the tune of $2.96 million in all from Hong Kong and not $1.78 million alone (see D1 at pages 656/7). The board seems to have overlooked the fact that one would expect a remittance shop to receive monies from others than someone like Ming Fai which would account for the excess over $1.78 million which I find he sent and which has been included in $2.96 million.

PPM's name on record at page 403 not considered.

I have already referred to the board's observations relating to PPM's evidence. As I have already said, this reference to extraneous evidence should never have been done. Whatever evidence PPM gave in 1963, it was not part of the record of the appeal the board was considering and he was never a witness therein. I do not know what evidence he gave apart from what the chairman has cited in reaching his conclusions after reading that evidence (as he sets out at page 102). It is interesting to note that Ex. P30 at page 403, though mentioned by the board elsewhere, is signed by apparently the same gentleman by name! The board does not mention this. The contents of this document do not coincide with what the evidence cited by the chairman from another proceeding says!

Strictures by board on evidence of sons.

While I am dealing with this topic I might as well dispose of the strictures against Ming Fai in the

grounds of decision and the reasons given for rejecting his evidence. It was said of this witness and his brother CCM that there was nothing much in their evidence to be desired.

The art of giving evidence with that clarity and precision sufficient to satisfy the most virulent critic is unfortunately rare and it could be said of a lot of witnesses who speak through interpreters that their evidence leaves much to be desired if one were to adopt an over-critical angle instead of endeavouring to reach the substantial truth of the matter. A more liberal and less critical approach all too often reveals that the witness is telling the truth despite odd expressions of his views on various matters and apparent discrepancies which make him seem evasive. I find that Ming Fai's evidence has, on the whole, the ring of truth and I can think of no satisfactory reason why he should have been dismissed on all the evidence he gave.

The board observed:

"... The observations I have made, to my mind, destroy the foundation on which the rest of CBH's evidence stands. I am satisfied, should the matter rest with me, that what I have stated disposes of the evidence of CBH taken in Hongkong."

In these observations criticisms were made of Ming Fai's finding it difficult to answer whether he had resided in any other place or country outside Hong Kong or China. A surprise was also expressed at his claiming to have had millions of Hong Kong dollars soon after the War and at his having given his address as Penang and not Hong Kong for the purposes of incorporation in the conveyance to him of the Hong Kong Park property in 1951. What has been overlooked is that he did not sign the conveyance of 1951 to himself, Ex. P23 (at page 289) and that the address in Penang was given in the letter of authority signed by the father requesting the vendors to convey this property to the son at that address in Penang, which is what the conveyance incorporated. The chairman surprisingly commented that because this address is thus given in the conveyance of 1951, therefore Ming Fai's statements relating to his address and residence in his statutory declaration and in his Income Tax returns must be incorrect. This is a clear *non sequitur*.

CCM's evidence.

What I have said with regard to the acceptability of Ming Fai's evidence applies with even greater force to the evidence of CCM. The documentary evidence clearly shows that it was he who entered into the contract of sale or dealt through his father as his agent to purchase the 'KLP' property and did in fact through solicitors purchase this property as evidenced by the conveyance.

Both these sons, Ming Fai and CCM, made no secret of the fact that they bought these properties on the recommendation of their father who was their agent. In Ming Fai's case he explained that he himself intended to settle down in Singapore around 1951 having regard to the Korean situation but that matters improved and he abandoned this idea. He eventually decided to sell 'HKP' in 1957. CCM, however, admitted in evidence that he bought this property in order to make a profit though he had no specific intention then like Ming Fai of settling down in Singapore. In both these cases there is ample evidence to show that the profits never went to the father but in each case were under the control of the two sons and accounted for to and dealt with by them.

The comptroller made a valiant effort to show that the sons were "stooges" or, as he put it, "nominees" of the father. From the record it would appear that apart from a faint-hearted effort in calling D.W. 1 and D.W. 2 who did not carry the case any further for the comptroller there was no rebuttal of the preponderating evidence in favour of the two sons having been genuine purchasers and that they sold these properties in the later fifties at a profit.

I would refer to the able submissions ("A.W.S." and "Reply to R.W.S.") by Mr. Hill both in the case for the appellant and in his subsequent reply with which I generally agree, particularly his analysis of the correct approach which should be taken of the case as a whole. The board appears to have made a piecemeal approach without considering the overall picture and giving credit where credit was due to a mass of evidence which was clearly undisputed if not unchallenged and often favourable to the appellant's case. Blanket rejection of the evidence of most of the witnesses for the appellant has been made, sometimes on the basis of one or two errors detectable in the evidence, which were either unchallenged or for which no explanation was required (e.g. see (iv) (h) at page 37 of "A.W.S." relating to an inaccuracy in Ex. P32), without one word being said about other innumerable facts in evidence which were favourable to the appellant's case and consistent with the veracity of the witnesses many of whom the board never saw.

In the case of one son, CKP, who did appear before the board, he was also summarily dismissed out of hand without anything concrete or substantial being said as to his demeanour or credibility when he appeared before the board. Even his evidence that the family house was being occupied by the appellant and his family appears either to have been rejected as untrue or entirely overlooked by the board. The fact that it was not demolished is not now in dispute. This son appears to have been rejected purely with regard to one mistake of which I approved an amendment to the record relating to a cheque dated 7th March 1964 which according to the record by the chairman he is said to have received in 1966 although he signed a receipt for it on the correct date. I saw then and still see no reason for rejecting his evidence as to this. He was never questioned about it.

Further fallacy in course of rebuttal of appellant's case.

At page 105 of the record in his grounds, the learned chairman, after dealing with the remittances from Hong Kong, proceeds to discuss 20 cheques issued by the remittance shop in May/June 1949 (Ex. D2) probably in an attempt to show that the monies which were received from Hong Kong between 30th May and 24th June 1949 left the country shortly afterwards.

The board relied on the evidence of D.W. 2 to the effect that certain cheques had been made out in favour

of Lee Wah Bank and others of which 13 were endorsed by him. This witness without having available most of the records relating to these remittances ventured the opinion that these marked cheques whose fate he did not know were intended for remittances out of Singapore. The board seems to have accepted the evidence of D.W.2 without the records being available and come to the conclusion that the monies shown in the account of the remittance shop (see page 590 *et seq.* of the record) were sent out of Singapore so shortly afterwards as to render it almost impossible that any of those monies were utilised to purchase the 'HKP' land in question.

Evidence incomprehensive and confusing.

It is not at all clear why this evidence was ever introduced by the comptroller or what he sought to show. Nor is the board clear as to its finding on it. Perhaps the comptroller was trying to show that there were no monies which could have been utilised by Ming Fai or on his behalf in relation to 'HKP.' It should be remembered, however that CYB, according to his statutory declaration, had more than one bank account, and it may well be that if all his bank accounts had been produced by the comptroller one would know whether all the monies received from Hong Kong by CYB as agent for the appellant were, as suggested by D.W. 2, sent out of Singapore although D.W. 2 was not quite sure of their destination. In any case, D.W. 2 did not make much more than a suggestion in relation to this because he did not have access to all the records.

As counsel for the appellant has said, there is no reason why money paid into one account should not be used for a different purpose and money be paid out subsequently from a further account (see page 64 of the record as well as page 12 (item viii) of "A.W.S."). As mentioned therein, quite apart from the conclusion reached by the board which I have already said contains a fallacy in the comptroller's argument if indeed the evidence proves anything at all, Mr. Hill said that there was indeed a tie-up between Ex. P22 item No. 1 showing a deposit made for the purchase of the 'HKP' land in the sum of $30,000 and a cheque for $30,000 dated 6th October, 1951 which is included in Ex. P1.

On the whole this evidence by D.W. 2 relating to the marked cheques and remittances by Lee Wah Bank adds up to nothing and one really doesn't know why all this evidence was introduced. Indeed Mr. Verick, on behalf of the comptroller, was not quite sure what his witness was going to say. So one can well understand the confusion that has arisen in the minds of both the comptroller and the board as a result of this attempt by the comptroller to introduce evidence in rebuttal of the appellant's case. In my view it is completely valueless and I propose to ignore this evidence altogether. It proves nothing one way or the other.

Reason for confusion as to evidence led in rebuttal.

A clue to the reason why, in my opinion, the board has become confused in this matter relating to the evidence in rebuttal by D.W. 1 and D.W. 2 lies largely at pages 30 to 32 of the record which show the attitude taken by counsel for the comptroller at the time towards the evidence which he was going to lead. At one stage he even said, at the beginning of page 30, that the comptroller "does not know what the evidence" was going to be. This was in relation to remittances from Hong Kong.

A little later certain objections were taken by counsel for the appellant to introduction of certain bundles of documents since they were not put to the witnesses in Hong Kong. The bundles were admitted after the comptroller's representative replied that the "onus of proof was on the appellant; the comptroller has no opportunity to cross-examine him; evidence taken before the hearing unsatisfactory; no opportunity to recall." All this appears from page 30 *et. seq.* and an attempt was also made to exclude the already-recorded evidence of the witnesses in Hong Kong after it had already been previously agreed that that course should be taken.

Board's reasons for admitting documents not put to Hong Kong witnesses.

The board explains its reasons at the foot of page 106 for allowing D1 and D3 to be admitted in evidence despite the objection that they had not been put to the witnesses in Hong Kong. The board explains why it did not agree with Mr. Hill. I am not impressed by the reasons given, one of them being that since the appellant did not give evidence before the board, the comptroller was not in a position to demonstrate to the board the justification for its assessments. If the documents were important enough then counsel should have questioned the witnesses about them and not tendered them in rebuttal out of the blue as it were, without being sure what they contained or what he was setting out to show by means of these documents.

Frustration and the vicious circle.

Then, most surprisingly, it is stated in the grounds that all these people from Hong Kong could have come, being substantial persons, to Singapore and given evidence before the board itself. The chairman concludes, "for reasons best known to themselves they have elected not to do so as has the appellant". What the board probably meant was, 'It is quite clear to the board that all of them were in a conspiracy to defraud revenue and dared not give evidence at the hearing for fear of contradicting one another or of incriminating themselves. We will therefore admit these documents to assist the comptroller in rebuttal because, poor man, he has been sufficiently frustrated by the appellant and his gang right from the word "Go"!'

I have taken some trouble to unravel the perplexing evidence led on behalf of the comptroller in rebuttal and to present it as clearly as I can, in all the circumstances, particularly when his counsel himself did not seem clear about this evidence.

The very root of the comptroller's action in levying the assessments on these two properties has been seriously challenged. He seems to have regarded this as an investigation case, where he could investigate any

financial matter however irrelevant to the transactions particularised and he has referred to movements of monies having little to do with the case merely because they may have had something to do with the appellant though not with these assessments. This was wrong and has led to the confusion in rebuttal. Moreover, he commenced his more relevant and pertinent inquiries *after* the assessments had been made and not *before* (see his correspondence with the Bank of China in November, 1966).

So far as Ming Fai is concerned he has shown to my satisfaction on the record that what he has said is most likely to be true as opposed to the comptroller's version which has hopelessly failed. The evidence relating to the remittances to the shop run by CYB for transmission to his father alone (albeit through 445 remitters) goes to the very root of the matter. We have to go back to 1951 to see what the position then was, nearly 20 years ago. It should also be remembered that considerable time has passed since the various matters to which the witnesses were referring occurred and it is not sufficient for the comptroller through his counsel to say, "Well, they seem to remember some things very clearly and some things not so clearly. When it suits their purpose their memories become revitalised." Their memories in relation to matters as old as this might have been even much better revitalised had questions been put to the witnesses with regard to what exactly the comptroller was trying to prove instead of his allowing his naturally full-blooded suspicions to cause him to levy the assessments without being more certain of his facts — hence the confusion which confounded him and the board as a result thereof.

Overall view of evidence as a whole.

In my judgment, the overall view must be taken and the overall view is in favour of the appellant notwithstanding his not giving evidence himself in respect of the two properties bought by his two sons in Hong Kong in relation to which they themselves gave the only acceptable evidence there is on either side. Attempts to reject them and the records of the family concern entirely because of matters such as their saying that they were present at meetings of the family concern here when they were admittedly in Hong Kong lose all sight of accepted practice amongst companies in the case of absentees actually concurring beforehand with resolutions of a meeting.

It will be noted that I have not dealt with the independent accountant employed on behalf of the appellant, P.W. 4. Whatever he says one way or the other is not a matter which binds either the board or this court. Undoubtedly there was some error relating to an entry in one of the cash books of the family concern and which P.W. 4 admitted was wrong. An explanation for this entry, as I have earlier said, was not required by the board though tendered. That kind of thing alone does not justify rejection of the entire audited accounts and records of a company or of Andrew Leong himself entirely.

Decision regarding assessments on 'HKP' and 'KLP' rejected.

On the whole I am more than satisfied that the board s decision on these two matters must be rejected on the evidence adduced as a whole however vulnerable to suspicion the appellant's position as *paterfamilias* and head of the family concern may have placed him in relation to matters which otherwise would not have appeared unsatisfactory. Even counsel for the comptroller admitted in "R.W.S." that the evidence of the sons might have been regarded as satisfactory but for the fact that the father was concerned in these matters and failed to give evidence. It was said that if he had given evidence he could have thrown light on a number of matters of which he also must have had knowledge and that he could have corroborated the sons. One cannot help observing that the comptroller was probably fervently hoping that he would in giving evidence show himself up in a bad light and thereby render unnecessary any reference at all to section 115 of the Evidence Ordinance. There is no assurance that he would have done so even if he had given evidence.

Summary of grounds of appeal accepted as sound.

It will be seen that thus far I have expressed agreement with more or less all the following grounds of appeal as affording a sound basis for setting aside the decision of the board so far as it concerns the properties owned by the two sons. I refer of course to grounds No. 2 (relating to the withdrawal of Income Tax Appeal No. 3 of 1962), No. 8 (relating to the rejection of the evidence of CBH and CCM as well as wrongful consideration of PPM's evidence in Income Tax Appeal No. 3 of 1962), Nos. 11, 12, 13, 15 (relating to appellant's failure to give evidence), No. 16 (relating to appellant's failure to discharge the burden of proof), Nos. 18, 20 (relating to remittances by Ming Fai from Hong Kong), No. 21 (relating to construction of CYB's statutory declarations) and No. 22 to mention the main ones. I do not generally disagree with the other grounds for reasons given by counsel in "A.W.S." and "Reply to R.W.S." but I have not, in view of what I have already said, dealt with them in greater detail.

It seems to me that all these grounds, some relating to issues of law and some involving considerations of mixed law and fact, are clearly within my province to consider on appeal and if these are sound it follows that the decision must be set aside and that, where necessary, I can reach my own independent conclusion on the facts by reviewing the evidence afresh as was done by Tan Ah Tah J. in *S.T.U.* v. *Comptroller of Income Tax*.[14]

This I have done and I have had the advantage of reading and considering carefully the views expressed by the board in its grounds of decision and lengthy, written as well as oral submissions by both counsel. I have been at pains to examine the documents particularly those referred to in the decision and the submissions and those on which reliance was placed one way or the other. I do not propose to review in detail the entire evidence and to set it out herein because were I to do so this judgment will become twice as long as it already is thus far.

Sham transactions and section 33.

Before I leave the matter of these two assessments I must turn to the doctrine of sham transactions and to section 33 of the Ordinance and section 260 of the Australian Income Tax Act. The comptroller stressed these matters "in the alternative" and the appellant had perforce to deal with them.

The board said:

"the dispositions of the two pieces of land by the appellant to his sons are fictitious and the purpose or effect of the dispositions was to avoid tax."

This finding is couched in terms which are a hybrid of the language of section 33 and the language of section 260. In fact it follows the language of section 260 more than it does the language of section 33 and it will be useful to look at these two sections side by side as follows:

"33—(1) Where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly.

(2) In this section 'disposition' includes any trust, grant, covenant, agreement or arrangement."

"260. Contracts to evade tax void — Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly —

(a) altering the incidence of any income tax;

(b) relieving any person from liability to pay any income tax or make any return;

(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or

(d) preventing the operation of this Act in any respect,

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose."

I think that no authority is required for the proposition that sham transactions are inherently worthless and that no legislation is required to make them worthless. If any authority be needed see *Gunn's* Income Tax Law and Practice of Australia, 8th Edition, Vol. IV at page 4198 for a discussion of this matter. If, as I have held, the appellant in his case has shown that the transactions were genuine and therefore not shams that is the end of the matter provided the comptroller has not in the course of his case rebutted the appellant and if in fact the appellant on the case as a whole has not satisfied the board that the tax imposed was excessive. It seems to me that when at the end of the appellant's case he has shown that the transactions were not shams or at least that they were genuine the comptroller has to prove that they were in fact shams which I have held that he has not done. Since, however, sections 33 and 260 were canvassed in the course of the submissions I propose to deal briefly with them. The board emphasised the decision in *Comptroller of Income Tax* v. *A.B. Estates Ltd.*[6] (a Malaysian Federal Court decision) since there has been no decision in Singapore in relation to section 33 of our Ordinance. That case refers to section 29, the Malaysian equivalent of our section 33, and then proceeds to a discussion of section 260.

Berriman's criticisms of 1967 Malaysian case.[6]

The appellant or more correctly his counsel reserved his position regarding the decision in the Malaysian case which he claimed was, so far as general principles in issue are concerned, wrongly decided for reasons advanced by Mr. Berriman in *Me Judice* Vol. VIII May, 1967 page 14. Counsel added that, assuming section 33 is the same as section 260, even under the latter, family arrangements though aimed at lessening the overall tax burden are unimpeachable and cited *Gunn's* Vol. IV page 4199.

Privy Council decision in Newton's case.

However, in so far as the facts in the current appeal before me can be distinguished from the facts before the Federal Court in Malaysia in the 1967 case under reference, I think I am justified in drawing attention to what I consider to be the more authoritative wisdom of the judgment of Lord Denning in the Privy Council in *Newton* v. *Commissioner of Taxation.*[7] Lord Denning was considering an Australian case in which section 260 was invoked and his judgment contains a full discussion of the various points of controversy which existed in Australia before his judgment as to the scope of section 260 and its construction to say nothing of its application.

I have read section 260 as contained in *Gunn* and I have read all the notes which *Gunn* contains in relation to section 260 commencing at page 4183 and ending at page 4206 including the leading cases cited therein.

Taxpayer must have vested right in property disposed of.

One clear principle seems to emerge from nearly all these cases and that is to the effect that the taxpayer must in the first instance have been the actual owner of or person with a vested right in property on which tax has been sought to be avoided either by a disposition to which effect was not given (see our section 33) or where the whole arrangement was so designed as to enable the taxpayer to retain the income of the property allegedly disposed of or otherwise transacted to another. We do not have a section like section 488 of the English Income and Corporation Taxes Act 1970 relating to gains from artificial transactions in land.

Did taxpayer derive income from property alienated?

To that extent those dispositions were not given effect to and can be said to have reduced tax within our section 33 and therefore could be avoided by the tax authority. I can do no better than to quote Lord Denning at page 467 of [1958] A.C. in his judgment as follows:

"Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by section 260. The whole of the transactions show that there was concerted action to an end — and that one of the ends sought to be achieved was the avoidance of liability for tax.

"This question then arises: What is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the Commissioner. As against him the arrangement is 'absolutely void' so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words 'absolutely void'. Ordinarily, if a transaction is absolutely void, it is void as against all the world. In this case what is meant is that the Commissioner is entitled completely to disregard the arrangement — and the ensuing transactions — so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an 'annihilating' provision — the Commissioner can use the section so as to ignore the transactions which are caught by it. But *the ignoring of the transactions — or the annihilation of them — does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them.* Their Lordships agree with the way in which Fullagar J. put it in his judgment: 'Section 260 alters nothing that was done as between the parties. But, for the purposes of income tax, it entitles the commissioner to look at the end result and to ignore all the steps which were taken in pursuance of the avoided arrangement'." (Emphasis supplied.)

The portion that I have quoted from the judgment of the Privy Council makes it quite clear that there are certain matters which do not exist in the circumstances of the current appeal. I accept Lord Denning's proposition; I would even go further to the extent of saying that I consider myself bound by it even though what is contained therein relates to section 260. I have no doubt in my mind that had Lord Denning been considering section 33 of our Ordinance he would have said exactly the same thing. Section 33 in my view has no real relevance to this case for the simple reason that if the comptroller disregards what he considers to be transactions or disposition which reduce tax there would be nothing left on which tax can be assessed. The disregarding of transactions does not itself create a liability to tax. Further, in order to make the appellant liable, the comptroller must show that moneys have come into his hands which the comptroller is entitled to treat as moneys derived by him i.e. as profits from the transactions.

This principle was affirmed by the Privy Council in *Desmond Lees Peate* v. *Commissioner of Taxation Commonwealth of Australia*,[15] and *Owen Thomas Mangin* v. *Inland Revenue Commissioner*.[16]

If this proposition requires to be spelt out with even greater pungency and clarity I would quote the following from *Gunn* at page 4196 based on leading cases:

"It is submitted that whilst section 260 may annihilate an agreement or arrangement, it contains no power to rectify the one or the other. Thus, for example, where property is agreed to be let at less than the true economic rent, there may be circumstances in which section 260 can be successfully invoked so as to render the agreement void, but there is no power in section 260 by which the actual rent can be raised to the economic rent so as to tax the lessor on that basis. See *Cecil Bros. Pty. Ltd.* v. *F.C. of T.* (1964) 9 A.I.T.R. 246."

Gunn continues with the following quotations:

"This difficult provision is expressed to make absolutely void, but without prejudice to its validity in any other respect or for any other purpose, every contract, agreement or arrangement so far as it has or purports to have the purpose or effect of in any way directly or indirectly avoiding any duty or liability imposed on any person by the Income Tax Assessment Act. In its application, perhaps it (section 260) can do no more than destroy a contract, agreement or arrangement in the absence of which a duty or liability would subsist ... To invalidate the transaction into which the prospective taxpayer in fact entered is not enough to impose upon him a liability which could only arise out of another transaction into which he might have entered but in fact did not enter. Where, however, the annihilation of an agreement or arrangement so far as it has the purpose or effect of avoiding liability to income tax leaves exposed a set of actual facts from which that liability does arise, the provision effectively operates to remove the obstacle from the path of the Commissioner and to enable him to enforce the liability" (*per* Rich, Dixon and Evatt JJ., in *Clarke* v. *F.C. of T.* (1932), 48 C.L.R. 56 at pp. 76, 77).

"The section is, of course, an annihilating provision only. It has no further or other operation than to eliminate from consideration for tax purposes such contracts, agreements and arrangements as fall within the descriptions it contains. It assists the Commissioner, in a case like the present, only if, when all contracts, agreements and arrangements having such a purpose or effect as the section mentions are obliterated, the facts which remain justify the Commissioner's assessment" (*per* the Court in *Bell* v. *F.C. of T.* (1953), 87 C.L.R. 548; 5 A.I.T.R. 462 at p. 476).

After disregarding transactions what income, if any, can comptroller show that appellant derived?

It seems to me that if the comptroller was entitled to disregard all the transactions commencing with the letter of authority from the appellant to convey the 'HKP' property to his son, Ming Fai, and all the other transactions culminating in the sale at profit to the family concern in 1956, i.e. if one were to annihilate or destroy all these transactions, the question arises: what does one have left? The answer is obvious. One has an uncompleted contract of sale of 1951 to the appellant. He may have had some rights as equitable owner at that stage. But looking at what is left, what was there to tax? In the case of 'KLP' there was nothing at all, not even an uncompleted contract of sale in the name of the appellant. Of course, if it were possible to ignore these transactions, assuming of course that the comptroller had established that all these were fictitious, then of course if the comptroller had power to reconstruct the whole matter and enter up the name of the appellant as the purchaser in the conveyances and in all the subsequent transactions as the person who completed the contract of sale to the family concern and that in fact he received the profit thereform, that would be an entirely different picture which does not exist on the facts before me in any sense of the word.

I have therefore no hesitation coming to the conclusion that the comptroller has misled himself. This I would repeat was never an investigation case. There are other matters relating to moneys having nothing to do with the moneys involved in the subject matter of the assessment which have been dealt with when they should not have been dealt with in the course of the case for the comptroller. All this, I suppose, was done in order to build up a formidable picture of an arrange-

ment designed to avoid or to reduce tax and so on. But the simple fact remains that there is no evidence at all that the appellant ever was or remained the owner of these properties in the first place or that he ever received the gains or profits from the sale of these properties to the family concern. In the circumstances I cannot see how it can ever be said that he is liable to tax on any income in relation to the two properties under reference.

It should be noted that section 33 does not contain a provision enabling the comptroller not only to disregard transactions and dispositions but also to substitute in their place whatever was representative of the true situation.

Assessments on park properties annulled.

To summarise, the decision upholding the assessment relating to the two park properties ('HKP' and 'KLP') cannot stand, for the reasons I have stated. I find that the appellant has discharged the onus upon him to show that the comptroller's assessment was wrong. As Shorland J. said in *Phillips* v. *I.R.C. (N.Z.)*.[17]

"The onus is upon the taxpayer to show that the commissioner's assessment is wrong; but whatever may be said about initial onus, I am of opinion that when the commissioner seeks to apply the 'assets method' of calculating a taxpayer's income, he must, in the final resort, undertake the burden of proving the existence of the asset which he claims the taxpayer has accumulated if the taxpayer's denial on oath of the ownership and existence of any such asset is to be displaced"

I have searched high and low through the record to discover what income, if any, the appellant accumulated as alleged by the comptroller in his additional assessments in relation to these two specified sources of income which have been denied during the hearing in circumstances clearly showing that ownership thereof did not lie with him. With regard to the application of section 33 of the Ordinance, in particular, I have found nothing to show that this section, for the reasons I have already stated earlier, helps the comptroller at all.

The case against the appellant in relation to these assessments is one and there is only one appeal against the assessments in relation not only to the 'HKP' and 'KLP' properties but also the assessment in relation to the house and land in Oxley Rise to which I would now turn.

Appellant's failure regarding Oxley Rise property assessment as agreed.

The case for the comptroller in relation to Oxley Rise is, however, not fraught with the same difficulties as he had to encounter in relation to the two park properties with which I have already dealt.

The same principle which counsel for the comptroller advanced in the course of his argument both before the board as well as before this court as to the adverse inference which may be drawn when a party withholds evidence arises for consideration in all three cases (see *Williamson's* case cited earlier) depending on the facts and circumstances of each case.

The appellant did not appear in three appeals relating to each property separately but only in one appeal affecting all three. He elected to give no evidence before the board in respect of all three.

One may suspect that, had it been possible, he would at least have given evidence in relation to Oxley Rise alone, which was, of the three, the only property of which he was actually owner, and in relation to which he was the only one possessed of knowledge peculiar to himself of the intention with which it was originally bought in 1951/2 and sold, in part, soon afterwards at a profit.

As the evidence has shown, a good part of the land was eminently suitable for development. Soon after he bought the land he applied to sub-divide it and it was in fact developed (as to the part sold) and laid out in building lots not long afterwards on its sale to the family concern of which the appellant himself was head. The other part of the land on which the family residence stands was not sold. The board mistakenly said in its grounds of decision that it was demolished but in my view, that mistake mainly affected the quantum of valuation which had by the time the appeal came before me, been agreed at a different figure from that originally assessed.

Whether a large piece of land was bought than originally needed as a family residence we do not know.

Whether the portion sold was sold to the family development concern because it was never intended to be sold, in the first instance, when the whole of the Oxley Rise land was purchased by the appellant, only the appellant knows. Whether it was or was not sold for profit in the course of an adventure in the nature of trade only the appellant could have explained, which he did not.

Onus on appellant.

The onus is on the appellant of proving that tax was wrongfully assessed on the portion sold and that no tax in this respect should have been imposed.

Appellant's peculiar knowledge of intention.

I therefore find that there was material before the board to enable it to reach the conclusion which it did having regard to the circumstances as a whole coupled with the withholding of evidence in this regard by the appellant himself who was the only person who could have enlightened the board as to the state of his mind at the relevant time.

I accordingly uphold the assessment in respect of that portion of Oxley Rise which the appellant sold to the family concern in the amount now agreed between the parties.

Subject to this adjustment in the total assessment, the appeal is allowed.

Appeal partly allowed.

Solicitors: *Rodyk & Davidson.*